

2019

Draft Guidance Note

**The Duty of Auditors to Report to
the Director of Corporate
Enforcement**

MISSION

To contribute to Ireland having a strong regulatory environment in which to do business by supervising and promoting high quality financial reporting, auditing and effective regulation of the accounting profession in the public interest

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THE DUTY OF AUDITORS TO REPORT TO THE DIRECTOR
OF CORPORATE ENFORCEMENT

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PART 1 - INTRODUCTION

- 1.1. This Guidance Note provides guidance to auditors on the requirements of section 393 of the Companies Act 2014 and section 122 of the Irish Collective Asset-management Vehicles Act 2015 ('the ICAV Act') to make a report to the Director of Corporate Enforcement regarding possible non-compliance with those Acts.
- 1.2. The use of the term 'auditor' throughout this document includes both statutory auditors and statutory audit firms approved in accordance with Part 27 of the Companies Act 2014. It also includes audit firms approved in another EU or EEA member state that have been registered in accordance with section 1465 of the Companies Act 2014.
- 1.3. Under the Companies Act 2014, the ICAV Act and other legislation, the primary responsibility for an entity's¹ compliance with legal and regulatory requirements rests with its directors. This responsibility includes reporting to the entity's shareholders, keeping adequate accounting records, safeguarding the assets of the entity and taking appropriate steps to prevent fraud and other irregularities.
- 1.4. Under the Companies Act 2014, and subject to the exemptions available under Chapter 15 and 16 of Part 6, shareholders are entitled to receive a report from an auditor as to whether, in that auditor's opinion, the financial statements presented by the directors give a true and fair view of the state of affairs of the company and of its profits (or losses) for the period under review and have been properly prepared in accordance with the relevant financial reporting framework and, in particular, with the requirements of the Companies Act 2014. Similarly, the ICAV Act provides that an ICAV shall arrange to have an auditor audit its annual accounts and make a report on the audit to the shareholders of the ICAV.
- 1.5. While auditors perform these duties in the interests of an entity's primary stakeholders, namely its shareholders, they also have regard to the public interest. Accordingly, in addition to requiring an auditor to report to shareholders, the Companies Act 2014, the ICAV Act and other legislation also impose duties on auditors to make disclosures to regulatory authorities in certain situations.
- 1.6. Whilst there are many similarities arising from the auditor's obligations to report to the Director of Corporate Enforcement under the Companies Act 2014 and the ICAV Act, there are a small number of key differences, such as the nature of the reportable offences and the standard of certainty triggering a reporting obligation. Therefore, this Guidance Note separates the guidance on the respective reporting obligations, as detailed in paragraph 1.7 below. Reference should be made to the relevant Part as appropriate to the circumstances.
- 1.7. Part 2 of this Guidance Note sets out the matters to be considered by auditors with regards to their obligation to report to the Director of Corporate Enforcement under Section 393 of the Companies Act 2014. Part 3 sets out the matters to be considered by auditors with regards to their obligation to report to the Director of Corporate under Section 122 of the ICAV Act and highlights where they differ from those under the Companies Act 2014. Part 4 provides guidance on the reporting of suspected offences beyond the scope of those provisions.

¹ Where the term entity/entities is used in this Guidance Note, it should be read as a reference to company/companies and/or ICAV/ICAVs where relevant.

- 1.8. This Guidance Note takes into account and applies the terms of relevant auditing standards to those provisions. It has been developed in consultation with the Office of the Director of Corporate Enforcement.
- 1.9. The guidance set out in this Guidance Note cannot be construed as a legal interpretation of section 393 of the Companies Act 2014 or section 122 of the ICAV Act. Where necessary, auditors should seek professional legal advice regarding these provisions.

PART 2 – DUTY OF AUDITORS TO REPORT TO THE DIRECTOR OF CORPORATE ENFORCEMENT UNDER SECTION 393(1) OF THE COMPANIES ACT 2014

SECTION 393(1) OF THE COMPANIES ACT 2014

“Where, in the course of, and by virtue of, their carrying out an audit of the financial statements of the company, information comes into the possession of the statutory auditors of a company that leads them to form the opinion that there are reasonable grounds for believing that a Category 1 or 2 offence may have been committed by the company or an officer or an agent of it, the statutory auditors shall, forthwith after having formed it, notify that opinion to the Director and provide the Director with particulars of the grounds on which they have formed that opinion.”

The reporting obligation applies to all audits of companies performed in accordance with the Companies Act 2014. This includes audits of Irish Companies performed by auditors resident outside the State who are legally permitted under the Companies Act 2014 to audit the financial statements of such companies.

2.1 AUDITING STANDARDS

2.1.1 A number of standards are of relevance to this subject. These include, primarily, ISA (Ireland) 250 Section A “Consideration of Law and Regulations in an Audit of Financial Statements” (‘ISA (Ireland) 250A’) (Revised July 2017) and ISA (Ireland) 250 Section B “The Auditor’s Statutory Right and Duty to Report to Regulators of Public Interest Entities and Regulators of Other Entities in the Financial Sector” (‘ISA (Ireland) 250B’). Where applicable, reference is made to these standards in the text of this Guidance Note.

2.1.2 Auditors must exercise adequate control and supervision over their staff conducting audit work. Paragraph 15 of ISA (Ireland) 220 “Quality Control for an Audit of Financial Statements” (‘ISA (Ireland) 220’) provides that the engagement partner shall take responsibility for the direction, supervision and performance of an audit engagement in compliance with professional standards and applicable legal and regulatory requirements. As required in ISA (Ireland) 250B: “The auditor shall ensure that all staff involved in the audit of a regulated entity have an understanding of: (a) the provisions of applicable legislation; (b) the regulator’s rules and any guidance issued by the regulator; and (c) any specific requirements which apply to the particular regulated entity, appropriate to their role in the audit and sufficient (in the context of that role) to enable them to identify situations which may give reasonable cause to believe that a matter should be reported to the regulator” (ISA (Ireland) 250B paragraph 11). While ISA (Ireland) 250B is specifically directed at auditors of entities in the financial sector, auditors may consider the standard useful in other circumstances. Paragraph A29-3 of ISA (Ireland) 250A states that the procedures and guidance set out in ISA (Ireland) 250B “can be adapted to circumstances in which the auditor of other types of entities identifies or suspects non-compliance with law or regulations which the auditor is under a statutory duty to report.”

2.1.3 ISA (Ireland) 250B also states that auditing firms need to establish adequate procedures to ensure that any matters which are discovered in

the course of, or as a result of, audit work which may give rise to a duty to report are brought to the attention of the engagement partner on a timely basis (ISA (Ireland) 250(B) paragraph A18).

2.2 NON-AUDIT ASSIGNMENTS

SECTION 393(1) OF THE COMPANIES ACT 2014

“Where in the course of, and by virtue of, their carrying out an audit of the financial statements of the company...”

- 2.2.1 Section 393(1) of the Companies Act 2014 provides that the obligation on auditors to report a possible Category 1 or 2 offence under the Companies Act 2014 to the Director of Corporate Enforcement arises where auditors are undertaking an audit of the financial statements of a company. Therefore, the reporting obligation does not apply to persons providing non-audit services to a company. Similarly, Section 393(1) of the Companies Act 2014 does not impose a legal obligation on persons undertaking non-audit services to inform the auditors within their firm of the information which has come into their possession.
- 2.2.2 The statutory duty to report to the Director of Corporate Enforcement under Section 393(1) applies to information which comes to the attention of auditors in the course of, and by virtue of, their carrying out of the audit work. In determining whether information is obtained in that capacity, ISA (Ireland) 250B identifies two criteria in particular which need to be considered, namely:
- (i) whether the person who obtained the information also undertook the audit work; and, if so,
 - (ii) whether it was obtained in the course of, or as a result of, undertaking the audit work (ISA (Ireland) 250B paragraph 4).
- 2.2.3 Where partners or staff, involved in the audit of a company, carry out work other than the audit (i.e. non-audit work), information about the company will be known to them as individuals. In circumstances which suggest that a matter may otherwise give rise to a statutory duty to report if obtained in the capacity of auditor, it will be prudent for them to make inquiries in the course of their audit work in order to establish whether this is the case from information obtained in that capacity.
- 2.2.4 The Ethical Standard for Auditors (Ireland) requires that a firm appointed as auditor of an entity shall have appropriate procedures to ensure that the partner responsible for the audit is made aware of any non-audit/additional services which it is proposed to provide to the entity (paragraph 5.9). The Ethical Standard further requires the engagement partner to assess the significance of the threats to the firm’s integrity, objectivity and independence (paragraph 5.12) and, where these are impaired or compromised, the firm shall either not undertake the non-audit/additional services or withdraw from the audit engagement (paragraph 5.16).
- 2.2.5 Information obtained in the course of non-audit work is not covered by the duty to report under section 393 of the Companies Act 2014. However, the firm appointed as auditor needs to consider whether the results of other work undertaken for the company in question needs to be assessed as part of the audit process. In principle this is no different to seeking to review a

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report prepared by outside consultants on the company's accounting systems so as to ensure that the auditor makes a proper assessment of the risks of misstatement in the financial statements and of the work needed to form an opinion. Consequently, the partner responsible for the audit needs to make appropriate inquiries in the process of planning (see paragraph 2.3.2 below) and completing the audit. Such inquiries would be directed to those aspects of the non-audit work which might reasonably be expected to be relevant to the audit.

2.2.6 A firm providing non-audit services to a company may be, at the time the service is provided, or may subsequently become, auditor to that company. For matters first identified in the course of providing non-audit services, the point in time at which the auditor's reporting obligation arises is when the auditor comes into possession of information, which leads him/her to form the opinion that there are reasonable grounds to believe that a category 1 or 2 offence may have been committed, as part of the undertaking of the audit.

2.3 SOURCES OF REPORTABLE INFORMATION COMING INTO POSSESSION OF THE AUDITOR

SECTION 393(1) OF THE COMPANIES ACT 2014
“...information comes into the possession of the statutory auditors of a company...”

2.3.1 Section 393(1) of the Companies 2014 Act provides that the obligation on auditors to report to the Director of Corporate Enforcement arises when information comes into their possession as part of the undertaking of the audit. Without prejudice to the guidance in the following paragraphs on the need for proper audit planning and associated requirements, the Director of Corporate Enforcement does not regard the obligation as requiring auditors to seek out possible Category 1 or 2 offences as part of the audit process. However, auditors should remain alert and react to information coming into their possession which suggests that a possible Category 1 or 2 offence may have occurred and make the necessary inquiries to ascertain if there are reasonable grounds to form an opinion that such an offence may have been committed (ISA (Ireland) 250A paragraph 16).

2.3.2 ISA (Ireland) 250A requires that in order to plan the audit, “the auditor shall obtain a general understanding of (a) the legal and regulatory framework applicable to the entity and the industry or sector in which the entity operates; and (b) how the entity is complying with that framework.” (ISA (Ireland) 250A paragraph 13)

2.3.3 Paragraph A13 of ISA (Ireland) 250A indicates that, in obtaining a general understanding of the legal and regulatory framework applicable to an entity and procedures followed to ensure compliance with this framework, auditors would particularly recognise that non-compliance with some laws and regulations may have a fundamental effect on the operations of the entity. That is, non-compliance with certain laws and regulations may cause the entity to cease operations, or call into question the entity's continuance as a going concern. For example, non-compliance with the requirements of the entity's license or other entitlement to perform its operations could have such an impact (for example, for a bank, non-compliance with capital or investment requirements).

2.3.4 The ISA states that “To obtain a general understanding of the legal and regulatory framework, and how the entity complies with that framework, the auditor may, for example:

- use the auditor’s existing understanding of the entity’s industry, regulatory and other external factors;
- update the understanding of those laws and regulations that directly determine the reported amounts and disclosures in the financial statements;
- inquire of management as to other laws or regulations that may be expected to have a fundamental effect on the operations of the entity;
- inquire of management concerning the entity’s policies and procedures regarding compliance with laws and regulations; and
- Inquire of management regarding the policies or procedures adopted for identifying, evaluating and accounting for litigation claims.” (ISA (Ireland) 250A paragraph A11)

2.3.5 “The auditor shall perform the following audit procedures to help identify instances of non-compliance with other laws and regulations that may have a material effect on the financial statements:

- inquiring of management, and, where appropriate, those charged with governance, as to whether the entity is in compliance with such laws and regulations; and
- inspecting correspondence, if any, with the relevant licensing or regulatory authorities.” (ISA (Ireland) 250A paragraph 15)

2.3.6 “During the audit, the auditor shall remain alert to the possibility that other audit procedures applied may bring instances of non-compliance or suspected non-compliance with laws and regulations to the auditor’s attention”. (ISA (Ireland) 250A paragraph 16)

2.3.7 On discovery of a possible instance of non-compliance, the ISA states: “if the auditor becomes aware of information concerning an instance of non-compliance or suspected non-compliance with laws and regulations, the auditor shall obtain (a) an understanding of the nature of the act and the circumstances in which it has occurred; and (b) further information to evaluate the possible effect on the financial statements.” (ISA (Ireland) 250A paragraph 19)

2.3.8 The ISA provides guidance that, when evaluating the possible effect on the financial statements, the auditor considers, inter alia, “the potential financial consequences of identified or suspected non-compliance with laws and regulations on the financial statements including, for example, the imposition of fines, penalties, damages, threat of expropriation of assets, enforced discontinuation of operations and litigation.” (ISA (Ireland) 250A paragraph A19)

2.3.9 It is clear, therefore, that where auditors detect the possible commission of a Category 1 or 2 offence under the Companies Act 2014, they are required by professional standards to carry out such further audit procedures into the matter as to provide them with an understanding of the nature of the facts and circumstances and to allow them to properly evaluate the possible effects on the financial statements, including the potential consequences of any fines or other sanctions (imposed on the

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company, its directors or officers) which might result from that non-compliance.

2.3.10 The maximum penalty on conviction on indictment of a Category 1 offence under the Companies Act 2014 is €500,000 and/ or 10 years' imprisonment. For Category 2 offences, the maximum penalty on indictment is €50,000 and/or 5 years' imprisonment. The Companies Act 2014 provides for lower penalties for summary convictions. Section 839(1) of the Companies Act 2014 provides that persons convicted on indictment of an offence involving fraud or dishonesty are automatically disqualified from acting as company directors/officers. The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person for any of the reasons set out in Section 842 of the Companies Act 2014, including a person guilty of two or more offences of failing to maintain adequate accounting records as outlined in Sections 281-285 of the Companies Act 2014.

2.3.11 The conviction of a company or any of its officers under the Companies Act 2014 and any consequential claims arising can have potentially very serious consequences for the company and its continuing operations, and by extension on its financial statements.

2.3.12 In the context of their investigations, section 387 of the Companies Act 2014 entitles auditors, inter alia, to require from the officers of the company such information as they think necessary for the performance of their duties. Failure to provide information or provision of false information to an auditor is, in itself, an offence which may be reportable. Any such non co-operation will be taken into account by an auditor when:

- forming his or her audit opinion;
- drafting the audit report; and
- deciding whether to continue in office or to decline re-appointment.

2.4 LEGAL OR OTHER PROFESSIONAL ADVICE

SECTION 393(1) OF THE COMPANIES ACT 2014

“...that leads them to form the opinion that there are reasonable grounds for believing...”

2.4.1 In order to meet their obligations under Section 393 of the Companies Act 2014, auditors need to exercise their professional judgement in determining if the information and evidence in their possession leads to the formation of the opinion that there are reasonable grounds for believing that a Category 1 or 2 offence may have been committed and that, therefore, the matter is reportable to the Director of Corporate Enforcement. A collective judgement may be made in the case of an auditing firm. While there is no obligation on auditors to obtain legal or other professional advice before forming that opinion, auditors may wish to seek such independent advice as part of the process of forming their opinion.

2.4.2 Where legal or other professional advice is obtained by the company in relation to the matter(s) about which the auditor has concerns, it remains the auditor's responsibility to form an opinion whether there are reasonable grounds for believing that a Category 1 or 2 offence may have been committed and the matter is reportable to the Director of Corporate Enforcement. While the auditor may consider the legal or other professional

advice obtained by the company in forming his/her opinion, he/she should also perform appropriate further audit procedures in respect of the matter.

2.5 REPORTABLE PERSONS

SECTION 393(1) OF THE COMPANIES ACT 2014
“...by the company or an officer or an agent of it...”

- 2.5.1 The company is the company which is being audited by the auditor ('Company A'). Subject to what follows, the reporting obligation does not therefore extend to another company ('Company B'), which the auditor of Company A may believe may have committed a reportable offence.
- 2.5.2 In addition, the term “company” must comply with the general definition of company in the Companies Act 2014 which is “a company formed and registered under this Act, or an existing company”.
- 2.5.3 The term “existing company” is separately defined as “a company formed and registered in a register kept in the State under the Joint Stock Companies Act, the Companies Act 1862, the Companies (Consolidation) Act, 1908 or the Act of 1963”.
- 2.5.4 The term “officer” is defined in section 2(1) of the Companies Act 2014. The term officer includes a “director or secretary”. It also includes the company’s auditor in limited circumstances.
- 2.5.5 In relation to certain offences under the Companies Act 2014, the term officer is extended to include shadow directors. The term ‘shadow director’ is defined in section 221 of the Companies Act 2014 as “a person in accordance with whose directions or instructions the directors of a company are accustomed to act”. Accordingly, where the possible offence is one which applies to shadow directors, the term officer includes shadow directors.
- 2.5.6 The term “agent” must comply with the general definition of agent in section 2(1) of the Companies Act 2014, which states “‘agent’ does not include a person’s counsel acting as such”. The term “agent” is commonly understood to refer to any person authorised to bind the company. Therefore, a company’s solicitor, acting in a capacity that binds the company, may be an agent of the company in certain circumstances.
- 2.5.7 Where the audit is of a group of companies, the obligation to report applies to the auditor of each individual company in the group.
- 2.5.8 The obligation to report to the Director of Corporate Enforcement that there are reasonable grounds to believe that a category 1 or 2 offence may have been committed extends to either of the following circumstances:
- where the reportable offence by an officer or agent of Company A relates to that company; or,
 - where the reportable offence by an officer or agent of Company A relates to a matter outside of that company.

In other words, a suspected Category 1 or 2 offence by an officer of Company A relating to his or her involvement in Company B is eligible to be reported by the auditor of Company A. Depending on the circumstances,

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the auditor of company B may also be required to make a report to the Director of Corporate Enforcement.

2.5.9 While the preceding paragraphs set out the general guidance to auditors on this matter, it is recognised that in many circumstances auditors will not be in a position to obtain sufficient information to allow the formation of an opinion as to whether there are reasonable grounds to believe that an officer or an agent of Company A may have committed a Category 1 or 2 offence in relation to Company B.

2.6 STANDARD OF CERTAINTY

SECTION 393(1) OF THE COMPANIES ACT 2014
“...may have been committed...”

2.6.1 Where auditors detect a suspected reportable breach of the Companies Act 2014, they should obtain sufficient information to enable the formation of an opinion as to whether there are reasonable grounds to believe that a Category 1 or 2 offence may have been committed. The auditor is not required to form an opinion that a breach has been committed. Once an auditor has reasonable grounds to form an opinion, the reporting obligation exists and it is not appropriate for the auditor to seek proof that an offence has been committed or that no offence has been committed.

2.6.2 ISA (Ireland) 250B provides the following guidance to auditors in this regard: “In assessing the effect of an apparent breach, the auditor takes into account the quantity and type of evidence concerning such a matter which may reasonably be expected to be available. If the auditor concludes that the auditor has been prevented from obtaining all such evidence concerning a matter which may give rise to a duty to report, the auditor would normally make a report direct to the regulator as soon as practicable.” (ISA (Ireland) 250B paragraph A25)

2.6.3 ISA (Ireland) 250B requires auditors to exercise their professional judgement. In forming that judgement, auditors undertake appropriate discussions and investigations to determine the circumstances but do not require the degree of evidence which would be a normal part of forming an opinion on financial statements. ISA (Ireland) 250B goes on to state that the appropriate investigations performed by auditors in these circumstances would normally include:

- inquiry of staff at an appropriate level;
- review of correspondence and documents relating to the transaction or event concerned; and
- discussion with those charged with governance or other senior management where appropriate (ISA (Ireland) 250B paragraph A28).

2.6.4 In the event that an auditor was to resign or to decline re-appointment in such circumstances, s/he would be obliged to serve a notice of resignation on the company and provide in the notice a statement of the circumstances which should be brought to the attention of the members/shareholders or creditors of the company. The auditor must send a copy of the notice to the Companies Registration Office and must notify IAASA within 30 days. In advance of resigning, the auditor shall make any reports required under section 393 of the Companies Act 2014.

2.7 REPORTABLE OFFENCES

SECTION 393(1) OF THE COMPANIES ACT 2014
“...that a Category 1 or 2 offence...”

2.7.1 There are four categories of offences within the Companies Act 2014. The penalties for each of the four categories are set out in Section 871 of the Companies Act 2014.

2.7.2 The Companies Act 2014 specifies where a breach of a particular provision is an offence and specifies the category of offence arising. Examples of possible Category 1 and 2 offences that an auditor may identify during the course of an audit include, but are not limited to:

- failure to keep adequate accounting records (Section 286);
- financial statements do not give a true and fair view (Sections 291 to 295);
- loans to directors or connected persons (Section 248);
- financial assistance for the acquisition of shares (Section 82); and
- approval of financial statements which do not give a true and fair view (Section 324(6)).

2.7.3 The obligation on the auditor to report to the Director of Corporate Enforcement under Section 393 of the Companies Act 2014 does not specify the time period within which the suspected offence may have occurred. Consequently, where an auditor has reasonable grounds to believe that a category 1 or 2 offence may have been committed prior to his/her appointment, he/she is required to make a report to the Director of Corporate Enforcement. In such cases, the auditor is not required to determine if a report was made to the Director of Corporate Enforcement by any previous auditor(s).

2.7.4 Category 1 or 2 offences under the Companies Act 2014 may be summarily prosecuted or prosecuted as an indictable offence. The sole prosecuting authority for indictable offences is the Director of Public Prosecutions (‘DPP’). It is a matter for the Director of Corporate Enforcement to determine in any particular case if the suspected indictable offence reported by an auditor should be prosecuted summarily or referred to the DPP. Where a case is referred to the DPP by the Director of Corporate Enforcement, the DPP will subsequently make an independent decision as to whether or not it should actually be prosecuted on indictment. In practice, the DPP may decide to refer a matter to the Garda Síochána for further investigation before making a final decision.

2.7.5 In considering whether or not to report that there are reasonable grounds to believe that an offence may have been committed, auditors are required to determine if the possible offence in question is a Category 1 or 2 offence. It is not the duty of auditors to make any other evaluation as to the seriousness or otherwise of an actual or possible offence. In the context of reporting under Section 393 of the Companies Act 2014 it is of no relevance to the formation of an auditor’s opinion as to:

- whether the possible offence has any impact on the company’s financial statements. It is quite possible that an auditor may be in a position to give an unqualified audit

report and yet be required to report a possible offence to the Director of Corporate Enforcement;

- what the policy of the Director of Corporate Enforcement or the Director of Public Prosecutions is with respect to the prosecution of offences of a particular type;
- the extent to which the suspected offence might involve a financial or other loss to any person. While this may be taken into account by the prosecuting authority in deciding whether or not to prosecute a case, the auditor has no role in making that adjudication on behalf of the prosecutor;
- whether the suspected offence may or may not have already been brought to the attention of the Director of Corporate Enforcement by the company, one of its officers or agents or another party. It is possible that any such report may not have included all relevant facts and details of the circumstances giving rise to the auditor’s concerns. Accordingly, it is necessary that the auditor provide his or her independent opinion of the possible offence; and/or
- whether or not circumstances giving rise to the offence have been rectified or otherwise settled. Again, this is a matter which may be taken into account by the prosecuting authority in deciding whether or not to prosecute a case, but it is likely that circumstances will arise from time to time where rectification of the circumstances is not in itself a sufficient response to the offence.

2.7.6 In addition to considering whether a suspected offence falls to be reported to the Director of Corporate Enforcement, the auditor assesses whether the particular circumstances indicate reportable offences under other Acts including, but not limited, to the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, the Criminal Justice Act 2011 and the Criminal Justice (Theft and Fraud Offences) Act 2001 and, where appropriate, reports these to the relevant authority such as the Garda Síochána, Revenue Commissioners etc. The auditor should be aware that there may be different thresholds for the reporting of suspected offences in these Acts.

2.8 TIMING OF FORMATION AND NOTIFICATION OF OPINION

SECTION 393(1) OF THE COMPANIES ACT 2014

“...the statutory auditors shall, forthwith after having formed it, notify that opinion to the Director...”

2.8.1 The provision provides that auditors are obliged to notify the Director of Corporate Enforcement of their opinion immediately after forming an opinion that there are reasonable grounds to believe that a Category 1 or 2 offence may have been committed. ISA (Ireland) 250B is broadly consistent with this provision in requiring that “when the auditor concludes, after appropriate discussion and investigations, that a matter which has come to the auditor’s attention gives rise to a statutory duty to make a report the auditor shall bring the matter to the attention of the regulator as soon as practicable...” (ISA (Ireland) 250B paragraph 13). While there may be circumstances where it is readily apparent that there are reasonable grounds to believe that a

Category 1 or 2 offence may have been committed and that a report is required, there will be other circumstances where the immediate formation of an opinion may not be possible by virtue of auditors having to obtain and assess additional information from the company, its officers and employees (paragraph 2.6.3 refers). The auditor should ensure that the performance of such additional procedures does not lead to unreasonable delay in the formation of his/her opinion, and reporting to the Director of Corporate Enforcement where necessary.

2.9 DETAILS OF THE GROUNDS

SECTION 393(1) OF THE COMPANIES ACT 2014
“...and provide the Director with particulars of the grounds on which they have formed that opinion.”

2.9.1 Auditors provide sufficient information in support of their opinion to enable the Director of Corporate Enforcement to evaluate properly the circumstances leading to the formation of the opinion. This guidance is supported by ISA (Ireland) 250B which requires, inter alia, “the auditor shall bring the matter to the attention of the regulator...in a form and manner which will facilitate appropriate action by the regulator”. (ISA (Ireland) 250B paragraph 13)

2.9.2 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;
- details of the possible Category 1 or 2 offence(s);
- details of the basis on which the auditor has formed the opinion that there are reasonable grounds to believe that a Category 1 or 2 offence may have been committed;
- the context in which the report is being made. ISA (Ireland) 250B offers guidance to auditors as to the type of information that may be included in this regard e.g.
 - the applicable legislative requirements and interpretations of those requirements which have informed the auditor’s judgment;
 - the extent to which the auditor has investigated the circumstances giving rise to the matter reported;
 - whether the matter has been discussed with those charged with governance; and
 - whether steps to rectify the matter have been taken (ISA (Ireland) 250B paragraph A39);
- any other information considered relevant by the auditor;
- auditor’s signature; and
- date of report.

2.9.3 For example, where the subject matter of the report is a suspected offence under section 239 of the Companies Act 2014 regarding a loan to a director, the auditor may wish to include the following information in the report:

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- where practical, the date(s) on which the loan(s) was/were advanced;
- the identity of each individual to whom the loan(s) was/were given;
- the value of the loan(s);
- whether the company's relevant assets were calculated by reference to the company's net assets as shown in the last preceding financial statements laid before an AGM or by reference to the company's called up share capital; and
- the extent to which 10% of the company's relevant assets were exceeded by the loan(s).

Where such information is not readily available to the auditor (i.e. from information contained in the audit working papers), the auditor refers the Director of Corporate Enforcement to the company and its directors.

2.9.4 A company's officer(s) or agent(s) may decide to compile a submission on the matter for the Director of Corporate Enforcement at the same time as the auditor's report to the Director of Corporate Enforcement. Issues that the officer(s) or agent(s) may wish to address if they choose to prepare such a submission might include, for example, their views on the report's subject matter and details of any corrective or remedial action taken or proposed. However, where the officer(s) or agent(s) elect to make a submission to the Director of Corporate Enforcement, auditors should ensure that, having formed an opinion that there are reasonable grounds for believing that a Category 1 or 2 offence may have been committed, their report to the Director of Corporate Enforcement is made forthwith. The officer(s) or agent(s) can, if they so wish, subsequently furnish a submission to the Director of Corporate Enforcement.

2.10 PROVISION OF FURTHER INFORMATION BY AUDITORS TO THE DIRECTOR OF CORPORATE ENFORCEMENT

2.10.1 Section 393(2) of the Companies Act 2014 provides that, following the submission of a report to the Director of Corporate Enforcement, if requested by the Director of Corporate Enforcement, auditors shall:

“(a) furnish the Director with such further information in their possession or control relating to the matter as the Director may require, including further information relating to the particulars of the grounds on which they formed the opinion referred to in that subsection,

(b) give the Director such access to books and documents in their possession or control relating to the matter as the Director may require, and

(c) give the Director such access to facilities for the taking of copies of or extracts from those books and documents as the Director may require.”

2.10.2 The purpose of this provision is to enable the Director of Corporate Enforcement to acquire further details of the information and evidence which initially led the auditor to report the possible offence and thereby to assist the Director of Corporate Enforcement in reaching an informed decision as

to what enforcement action (if any) is warranted by him/her as a result of the indicated circumstances.

- 2.10.3 The decision of the Director of Corporate Enforcement as to whether he/she will close the case without further action, recommend administrative resolution of the case perhaps by way of letter, or commence the preparation of a case for legal proceedings, depends on him/her having access to the fullest possible information concerning the incident or incidents that gave rise to the auditor's report. Every report made to the Office of the Director of Corporate Enforcement is dealt with in this manner so it is to the benefit of all parties that this information be gathered as efficiently as possible.
- 2.10.4 An officer or officers of the Director of Corporate Enforcement may seek to acquire the further information and documents relating to the matter by way of correspondence and/or discussion. Where an officer or officers attends at the office of an auditor, the auditor may be required to make available facilities for the copying of relevant books or documents, or extracts thereof, in the auditor's possession.
- 2.10.5 The information or books and documents to be made available is limited to that which is actually in the possession of the auditor or under his/her control and which relates to the matter. The term "books and documents" is defined in section 2(1) of the Companies Act 2014 as including "deeds, writings and records made in any other manner, and, where not separately mentioned in the provision concerned, accounting records". Accordingly, the information, books and documents to be made available comprise both electronic and physical material. It should be noted that the auditor is not required to provide original documentation and there is no requirement to seek out additional information beyond that which is in the auditor's possession or control as a result of a request under this section.
- 2.10.6 The meaning of the phrase "relating to the matter" will depend on the particular circumstances of each report and the nature and amount of information in the possession of the auditor. It would be impossible to produce a definitive list of all information that could relate to the matter and could be in the possession or control of the auditor, as this will vary with each offence and with the amount and quality of information that the auditor has in his/her possession or control.
- 2.10.7 Books and documents may include records of meetings or discussions considering the issue directly, documentation on how the opinion was reached, working papers that highlight the matter as part of the audit fieldwork, as well as any other documents in the possession or control of the auditors that relate to the matter. Other documents may include client records and files or documents relating to non-audit services provided to the company that relate to the matter reported and are in the possession or control of the auditor. The auditor should redact information that does not relate to the matter.
- 2.10.8 Section 393(5) of the Companies Act 2014 makes clear that the Director of Corporate Enforcement's right to the information, books and documents which relate to the matter does not extend to material which is covered by legal professional privilege. An auditor can accordingly properly refuse to provide such material. The issue of whether information or documents attract legal professional privilege will need to be considered carefully. The question is one of law which, in appropriate circumstances, may fall to be determined by the Courts. Accordingly, auditors seeking to limit disclosure on the basis of legal professional privilege are advised to consider taking legal advice. Such situations are likely to be rare. For example, it is unlikely

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that the audit work carried out and documented by the auditor which resulted in the identification of a reportable matter will be privileged.

2.11 PROTECTION AGAINST LIABILITY

Section 393(4) of the Companies Act 2014 protects auditors from liability in discharging their legal duties under section 393. This protection covers the requirement on auditors to report to the Director of Corporate Enforcement their opinion that there are reasonable grounds to believe that a category 1 or 2 offence may have been committed, to provide the Director of Corporate Enforcement with details of the grounds for that opinion and to provide additional information in their possession related to the matter, if requested by the Director of Corporate Enforcement.

2.11.1 In addition to the statutory protection afforded to auditors under section 393(4) of the Companies Act 2014, professional standards also offer auditors guidance on this matter. ISA (Ireland) 250B (Appendix 1, paragraph 9) states “Confidentiality is an implied term of the auditor’s contracts with client entities. However, in the circumstances leading to a right or duty to report, the auditor is entitled to communicate to regulators in good faith information or opinions relating to the business or affairs of the entity or any associated body without contravening the duty of confidence owed to the entity and, in the case of a bank, building society and friendly society, its associated bodies.”

2.12 THE DIRECTOR OF CORPORATE ENFORCEMENT’S RESPONSE TO AUDITORS’ REPORTS

2.12.1 Every auditor’s report received will be examined by the Office of the Director of Corporate Enforcement and an acknowledgement issued. Where considered necessary, clarification or further information may be sought from the directors of the company, the auditor or other persons as required. Assuming a prima facie breach of the Companies Act 2014 is disclosed, the Director of Corporate Enforcement and his/her officers will consider various matters before determining the next step. These include:

- whether the offence alleged would be more appropriately considered under the jurisdiction of another statutory body;
- the seriousness of the suspected offence;
- whether the offence has been remedied and the extent to which the remedy in itself is a sufficient outcome; and
- what evidence may be required by way of documentation or oral statements to assist in the conduct of a proper investigation of the alleged offences.

2.12.2 Where action is appropriate by his/her Office, the Director of Corporate Enforcement will endeavour to respond in a manner which is likely to be both effective and proportionate in relation to the indicated offence.

PART 3 – DUTY OF AUDITORS TO REPORT TO THE DIRECTOR OF CORPORATE ENFORCEMENT UNDER SECTION 122(1) OF THE IRISH COLLECTIVE ASSET-MANAGEMENT VEHICLES ACT 2015

SECTION 122(1) OF THE ICAV ACT

“Where, in the course of, and by virtue of, carrying out an audit of the accounts of an ICAV, information comes into the possession of the auditor that leads the auditor to form the opinion that there are reasonable grounds for believing that the ICAV, or an officer or agent of it, has committed an indictable offence under this Act, the auditors shall, without delay after having formed such opinion, notify that opinion to the relevant enforcement agency and provide that enforcement agency with details of the grounds on which they have formed that opinion.”

3.1 INTRODUCTION

3.1.1 An ICAV is an Irish collective asset-management vehicle that is registered by the Central Bank of Ireland as such under the ICAV Act.

3.1.2 Much of the guidance provided in Part 2 of this Guidance Note is relevant to auditors of ICAVs as well as to auditors of companies under the Companies Act 2014. The purpose of this Part 3 is to highlight the key differences between the reporting regimes under the ICAV Act and the Companies Act 2014. As such auditors of ICAVs should cross-refer to the relevant guidance in Part 2, whilst bearing in mind specific differences highlighted in this Part 3.

3.1.3 As regards ‘standard of certainty’, a report to the Director of Corporate Enforcement is triggered:

- for auditors of ICAVs, where they form the opinion that there are reasonable grounds for believing that the ICAV, or an officer or an agent of it, has committed an indictable offence under the ICAV Act; and
- for auditors of companies where they form the opinion that there are reasonable grounds for believing that the company, or an officer or an agent of it, may have committed a category 1 or 2 offence under the Companies Act 2014.

Further detail is provided in Section 3.7 “Standard of Certainty” below.

3.1.4 Section 122(5) of the ICAV Act provides that the term “relevant enforcement agency” means:

- “(a) for the offences specified in subsection (1) of section 176, the Bank;
- (b) for the offences specified in subsection (2) of that section, the Director of Corporate Enforcement;
- (c) for the offences specified in subsection (3) of that section, both the Bank and the Director of Corporate Enforcement.”

“The Bank” is defined in section 2 of the ICAV Act as the Central Bank of Ireland. Further detail is provided in Section 3.6 “Reportable Offences” below.

3.2 AUDITING STANDARDS

3.2.1 The guidance set out in Section 2.1 “Auditing Standards” relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act. When reading the guidance in Section 2.1, the auditor of an ICAV should bear in mind that the standard of certainty and offences reportable to the Director of Corporate Enforcement under the ICAV Act differ to those in the Companies Act 2014 (Sections 3.7 and 3.8 respectively provide further guidance in this regard).

3.3 NON-AUDIT ASSIGNMENTS

SECTION 122(1) OF THE ICAV ACT

“Where, in the course of, and by virtue of, their carrying out an audit of the accounts an ICAV...”

3.3.1 The guidance set out in Section 2.2 “Non-Audit Assignments” relating to the duty of auditors to report to the Director under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director under section 122 of the ICAV Act.

3.4 SOURCES OF REPORTABLE INFORMATION COMING INTO POSSESSION OF THE AUDITOR

SECTION 122(1) OF THE ICAV ACT

“...information comes into the possession of the auditor...”

3.4.1 The guidance set out in Section 2.3 “Sources of Reportable Information Coming into the Possession of the Auditor” relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act.

3.4.2 Paragraph 3.8.3 below provides details of the maximum penalties on conviction of an indictable offence under the ICAV Act.

3.4.3 In the context of their investigations, section 128 of the ICAV Act entitles auditors, inter alia, to require from the officers of the ICAV such information as they think necessary for the performance of their duties.

3.5 LEGAL OR OTHER PROFESSIONAL ADVICE

SECTION 122(1) OF THE ICAV ACT
“...that leads the auditor to form the opinion that there are reasonable grounds for believing...”

3.5.1 The guidance set out in Section 2.4 “Legal or Other Professional Advice” relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act.

3.6 REPORTABLE PERSONS

SECTION 122(1) OF THE ICAV ACT
“... that the ICAV, or an officer or an agent of it...”

3.6.1 ‘ICAV A’ is the ICAV which is being audited by the auditor. Subject to what follows, the reporting obligation under section 122 of the ICAV Act does not therefore extend to another ICAV (‘ICAV B’), which the auditor of ICAV A has reasonable grounds for believing has committed a reportable offence.

3.6.2 An “ICAV” is an Irish collective asset-management vehicle, defined in the ICAV Act as “a body registered as such under this Act”.

3.6.3 Section 2 of the ICAV Act states that the term “officer” includes a director or secretary.

3.6.4 In relation to certain offences under the ICAV Act, the term officer is extended to include shadow directors. The term “shadow director” is defined in section 2 of the ICAV Act as “a person in accordance with whose directions or instructions the directors of the ICAV are accustomed to act”. Accordingly, where the possible offence is one which applies to shadow directors, the term officer includes shadow directors.

3.6.5 Where an ICAV is part of a group being audited, the obligation to report under section 122 applies to the auditor of each ICAV within the group.

3.6.6 The obligation to report to the Director of Corporate Enforcement that there are reasonable grounds to believe that an indictable offence has been committed extends to either of the following circumstances:

- where the reportable offence by an officer or agent of ICAV A relates to that ICAV; or,
- where the reportable offence by an officer or agent of ICAV A relates to a matter outside of that ICAV.

In other words, a suspected indictable offence by an officer of ICAV A relating to his or her involvement in ICAV B is eligible to be reported by the auditor of ICAV A. Depending on the circumstances, the auditor of ICAV B

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may also be required to make a report to the Director of Corporate Enforcement.

- 3.6.7 While the preceding paragraphs set out the general guidance to auditors on this matter, it is recognised that in many circumstances, auditors will not be in a position to obtain sufficient information to allow the formation of an opinion as to whether there are reasonable grounds to believe that an officer or an agent of ICAV A has committed an indictable offence under the ICAV Act in relation to ICAV B.

3.7 STANDARD OF CERTAINTY

SECTION 122(1) OF THE ICAV ACT

“...has committed...”

- 3.7.1 While, the term “has committed” is a higher standard of certainty than “may have been committed” in the Companies Act 2014, the auditor of an ICAV should bear in mind that conclusive proof is not required, i.e. he/she is required to report to the Director of the Corporate Enforcement where there are reasonable grounds to believe that an indictable offence under section 176(2) or 176(3) of the ICAV Act has been committed.
- 3.7.2 Where auditors detect a suspected reportable offence under the ICAV Act, they should obtain sufficient information to enable the formation of the opinion as to whether there are reasonable grounds to believe that an indictable offence under section 176(2) or 176(3) has been committed i.e. firm evidence is not required. While an auditor may require more detailed information or explanations from management than he/she may consider necessary for reporting to the Director of Corporate Enforcement under section 393 of the Companies Act 2014, he/she is not required to prove that an offence of the ICAV Act has been committed. Once he/she has reasonable grounds to form an opinion that an indictable offence has been committed, the reporting obligation exists under section 122 of the ICAV Act.
- 3.7.3 The guidance set out in paragraphs 2.6.2 and 2.6.3 of this Guidance Note relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act. The auditor of an ICAV should bear in mind that the standard of certainty and offences reportable to the Director under ICAV Act differ to those in the Companies Act 2014 (this section and section 3.8 provide further guidance in this regard).
- 3.7.4 In the event that an auditor was to resign or to decline re-appointment of an ICAV in circumstances where a possible offence is reportable to the Director of Corporate Enforcement under Section 122 of the ICAV Act, he/she would be obliged serve a notice of resignation on the ICAV and provide in the notice a statement of the circumstances which should be brought to the attention of the shareholders or creditors of the ICAV. The auditor must send a copy of the notice to the Central Bank within 14 days. In advance of resigning, the auditor shall make any reports required under section 122 of the ICAV Act.

3.8 REPORTABLE OFFENCES

SECTION 122(1) OF THE ICAV ACT
“...an indictable offence under this Act ...”

3.8.1 There are three categories of offences within the ICAV Act. The penalties for each of the three categories are set out in Section 186 of that Act.

3.8.2 Category 1 or 2 offences under the ICAV Act may be summarily prosecuted or prosecuted as an indictable offence. As noted in paragraph 2.7.4 above, the sole prosecuting authority for indictable offences is the DPP.

3.8.3 The maximum penalty on conviction on indictment of a category 1 offence under the ICAV Act is €500,000 and/ or 10 years' imprisonment. For Category 2 offences, the maximum penalty on indictment is €50,000 and/or 5 years' imprisonment. The ICAV Act provides for lower penalties for summary convictions.

3.8.4 The possible indictable offences that come within the scope of the auditor's duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act relate to:

- prohibition on undischarged bankrupt acting as officer (Section 63(1));
- duty of auditor to report to enforcement agency (Section 122(6)); and
- auditor acting where ineligible (Section 124(2)).

For the second and third bullets, the auditor must also report to the Central Bank as these are offences specified in Section 176(3) of the ICAV Act.

3.8.5 The guidance set out in paragraphs 2.7.3 to 2.7.6 of this Guidance Note relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also applicable to the auditor's duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act. When reading the guidance in these paragraphs, the auditor of an ICAV should bear in mind that the standard of certainty and offences reportable to the Director of Corporate Enforcement under ICAV Act differ to those in the Companies Act 2014 (Section 3.7 and this section provide further guidance in this regard).

3.9 TIMING OF FORMATION AND NOTIFICATION OF OPINION

SECTION 122(1) OF THE ICAV ACT
“...the auditors shall, without delay after having formed such an opinion, notify that opinion to the relevant enforcement agency ...”

3.9.1 The guidance set out in Section 2.8 “Timing of Formation and Notification of Opinion” relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also

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applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act.

3.10 DETAILS OF THE GROUNDS

SECTION 122(1) OF THE ICAV ACT

“...and provide that enforcement agency with details of the grounds on which they have formed that opinion.”

3.10.1 The guidance set out in Section 2.9 “Details of the Grounds” relating to the duty of auditors to report to the Director of Corporate under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act.

3.11 PROVISION OF FURTHER INFORMATION BY AUDITORS TO THE DIRECTOR OF CORPORATE ENFORCEMENT

3.11.1 Section 122(2) of the ICAV Act provides that, following the submission of report to the Director of Corporate Enforcement, if requested by the Director of Corporate Enforcement, auditors shall:

SECTION 122(2) OF THE ICAV ACT

“(a) furnish that enforcement agency with such further information in the auditor’s possession or control relating to the matter as that enforcement agency may require, including further information relating to the details of the grounds on which the auditor formed the opinion referred to in that subsection,

(b) give that enforcement agency such access to any documents in the auditor’s possession or control relating to the matter as that enforcement agency may require, and

(c) give that enforcement agency such access to facilities for the taking of copies of, or extracts, from those books and documents as that enforcement agency may require.”

3.11.2 Section 2 of the ICAV Act provides that information “includes information contained in a document”.

3.11.3 Section 122(3) of the ICAV Act makes clear that the Director of Corporate Enforcement’s right to the information, books and documents which relate to the matter does not extend to material which is covered by legal professional privilege

3.11.4 The guidance set out in Section 2.10 “Provision of Further Information by Auditors to the Director of Corporate Enforcement” relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act.

3.12 PROTECTION AGAINST LIABILITY

3.12.1 Section 122(4) of the ICAV Act protects auditors from liability in discharging their legal duties under section 122.

3.12.2 The guidance set out in Section 2.11 “Protection Against Liability” relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act.

3.13 THE DIRECTOR OF CORPORATE ENFORCEMENT’S RESPONSE TO AUDITORS’ REPORTS

3.13.1 The guidance set out in Section 2.12 “The Director of Corporate Enforcement’s Response to Auditors’ Reports” relating to the duty of auditors to report to the Director of Corporate Enforcement under the Companies Act 2014 is also applicable to the auditor’s duty to report to the Director of Corporate Enforcement under section 122 of the ICAV Act.

PART 4 - REPORTING IN THE PUBLIC INTEREST OF SUSPECTED OFFENCES BEYOND THE SCOPE OF SECTION 393 OF THE COMPANIES ACT 2014 AND SECTION 122 OF THE ICAV ACT

4.1.1 ISA (Ireland) 250B (paragraph 15) states: “When a matter comes to the auditor’s attention which the auditor concludes does not give rise to a statutory duty to report but nevertheless gives rise to a statutory right to report, and may be relevant to the regulator’s exercise of its functions, the auditor may:

- (a) Consider whether the matter should be brought to the attention of the regulator under the terms of the appropriate legal provisions enabling the auditor to report direct to the regulator; and, if so
- (b) Advise those charged with governance that in the auditor’s opinion the matter should be drawn to the regulators’ attention.

Where the auditor is unable to obtain, within a reasonable period, adequate evidence that those charged with governance have properly informed the regulator of the matter, the auditor shall make a report direct to the regulator as soon as practicable.”

4.1.2 The guidance to ISA (Ireland) 250A (paragraph A33-1) states that “where the auditor has identified or suspects non-compliance with laws and regulations which does not give rise to a responsibility under law, regulation or relevant ethical requirements to report to an appropriate authority outside the entity, the auditor considers whether the matter may be one that ought to be reported in the public interest to an appropriate authority outside the entity.”

4.1.3 Paragraph A33-5 of ISA (Ireland) 250A states that “‘Public Interest’ is a concept that is not capable of general definition. Each situation must be considered individually. Such matters that may be taken into account when considering whether disclosure is justified in the public interest may include:

- the extent to which the identified or suspected non-compliance with laws and regulations is likely to affect members of the public;
- whether those charged with governance have rectified the matter or are taking, or are likely to take, effective corrective action;
- the extent to which non-disclosure is likely to enable the identified or suspected non-compliance with law and regulations to recur with impunity;
- the gravity of the matter;
- whether there is a general ethos within the entity of disregarding laws and regulations; and
- the weight of evidence and the degree of the auditor’s suspicion that there has been non-compliance with laws or regulations.”

4.1.4 The protection afforded to auditors under Section 393 of the Companies Act 2014 and Section 122 of the ICAV Act does not extend to public interest reporting. While ISA (Ireland) 250A provides guidance to auditors under these circumstances, auditors may need to take legal advice before making a decision on whether the matter should be reported to a proper authority in the public interest.

4.1.5 ISA (Ireland) 250A states that “determination of where the balance of public interest lies requires careful consideration. An auditor whose suspicions have been aroused uses professional judgment to determine whether the auditor’s misgivings justify the auditor in carrying the matter further or are too insubstantial to deserve reporting.” (ISA (Ireland) 250A paragraph A33-4)

4.1.6 Auditors can limit the risk of liability for breach of confidence or defamation provided that (ISA (Ireland) 250A paragraph A33-4):

- “in the case of breach of confidence, the disclosure is made in the public interest, and such disclosure is made to an appropriate body or person, and there is no malice motivating the disclosure; and
- in the case of defamation, disclosure is made in the auditor’s capacity as auditor of the entity concerned, and there is no malice motivating the disclosure.”

4.1.7 It is important for auditors to report to the appropriate authorities. A footnote to paragraph A33-4 of ISA (Ireland) 250A says that appropriate authorities outside the entity could include the Garda Bureau of Fraud Investigation, the Revenue Commissioners, the Irish Stock Exchange, the Central Bank of Ireland, the Pensions Authority, the Director of Corporate Enforcement, the Health and Safety Authority, The Charities Regulatory Authority and the Department of Business, Enterprise and Innovation. Paragraph A33-6 of ISA (Ireland) 250A states that “An auditor will reduce the risk of being held in breach of duty to a client if he or she acts reasonably and in good faith in informing an appropriate authority of non-compliance with laws or regulations which the auditor suspects has been committed even if, an investigation or prosecution having occurred, it were found that there had been no offence.”

4.1.8 The application and other explanatory material to the ISA goes on to state that the auditor needs to remember that the auditor’s decision as to whether to report, and if so to whom, may be called into question at a future date, for example on the basis of:

- what the auditor knew at the time;
- what the auditor ought to have known in the course of the audit;
- what the auditor ought to have concluded; and
- what the auditor ought to have done.

The auditor may also wish to consider the possible consequences if financial loss is occasioned by non-compliance with laws and regulations which the auditor suspects (or ought to suspect) has occurred but decides not to report (ISA (Ireland) 250A paragraph A33-7).

4.1.9 Where, having considered any views expressed on behalf of the entity and in the light of any legal advice obtained, the auditor concludes that the matter ought to be reported to an appropriate authority in the public interest, the auditor notifies those charged with governance in writing of their conclusion and, if the entity does not voluntarily do so itself or is unable to provide evidence that the matter has been reported, the auditor reports it direct to an appropriate authority (ISA (Ireland) 250A paragraph A33-2). The auditor reports a matter to the proper authority in the public interest and without discussing the matter with the entity if the auditor concludes that the identified or suspected non-compliance has caused the auditor to no longer have confidence in the integrity of those charged with governance (ISA (Ireland) 250A paragraph A33-3).

APPENDIX 1 - SECTION 393 OF THE COMPANIES ACT 2014

- (1) “Where, in the course of, and by virtue of, their carrying out an audit of the financial statements of the company, information comes into the possession of the statutory auditors of a company that leads them to form the opinion that there are reasonable grounds for believing that a category 1 or 2 offence may have been committed by the company or an officer or agent of it, the statutory auditors shall, forthwith after having formed it, notify that opinion to the Director and provide the Director with particulars of the grounds on which they have formed that opinion.
- (2) Where the statutory auditors of a company notify the Director of any matter pursuant to subsection (1), they shall, in addition to performing their obligations under that subsection, if requested by the Director -
 - (a) furnish the Director with such further information in their possession or control relating to the matter as the Director may require, including further information relating to the particulars of the grounds on which they formed the opinion referred to in that subsection,
 - (b) give the Director such access to books and documents in their possession or control relating to the matter as the Director may require, and
 - (c) give the Director such access to facilities for the taking of copies of or extracts from those books and documents as the Director may require.
- (3) Any written information given in response to a request of the Director under subsection (2) shall, in all legal proceedings (other than proceedings for an offence), be admissible without further proof, until the contrary is shown, as evidence of the facts stated in it.
- (4) No professional or legal duty to which statutory auditors are subject by virtue of their appointment as statutory auditors of a company shall be regarded as contravened by, and no liability to the company, its shareholders, creditors or other interested parties shall attach to, statutory auditors, by reason of their compliance with an obligation imposed on them by or under this section.
- (5) Nothing in this section compels the disclosure by any person of any information that the person would be entitled to refuse to produce on the grounds of legal professional privilege or authorises the inspection or copying of any document containing such information that is in the person’s possession.
- (6) A person who contravenes subsection (1) or fails to comply with a request under subsection (2) shall be guilty of a category 3 offence.”

APPENDIX 2 - SECTION 122 OF THE IRISH COLLECTIVE ASSET-MANAGEMENT VEHICLES ACT 2015

- (1) “Where, in the course of, and by virtue of, carrying out an audit of the accounts of an ICAV, information comes into the possession of the auditor that leads the auditor to form the opinion that there are reasonable grounds for believing that the ICAV, or an officer or agent of it, has committed an indictable offence under this Act, the auditors shall, without delay after having formed such opinion, notify that opinion to the relevant enforcement agency and provide that enforcement agency with details of the grounds on which they have formed that opinion.
- (2) Where the auditor of an ICAV notifies the relevant enforcement agency of any matter pursuant to subsection (1), the auditor shall, in addition to performing the obligations under that subsection, if requested by that enforcement agency—
 - (a) furnish that enforcement agency with such further information in the auditor’s possession or control relating to the matter as that enforcement agency may require, including further information relating to the details of the grounds on which the auditor formed the opinion referred to in that subsection,
 - (b) give that enforcement agency such access to any documents in the auditor’s possession or control relating to the matter as that enforcement agency may require, and
 - (c) give that enforcement agency such access to facilities for the taking of copies of, or extracts from, those books and documents as that enforcement agency may require.
- (3) Nothing in this section compels the disclosure by any person of any information that the person would be entitled to refuse to produce on the grounds of legal professional privilege or authorises the inspection or copying of any document containing such information that is in the person’s possession.
- (4) No professional or legal duty to which an auditor is subject by virtue of appointment as an auditor of an ICAV shall be regarded as contravened by, and no liability to the ICAV, its shareholders, creditors or other interested parties shall attach to, an auditor by reason of compliance with an obligation imposed by or under this section.
- (5) The Bank and the Director of Corporate Enforcement are enforcement agencies for the purposes of this section; and in this section “relevant enforcement agency” means—
 - (a) for the offences specified in subsection (1) of section 176, the Bank;
 - (b) for the offences specified in subsection (2) of that section, the Director of Corporate Enforcement;
 - (c) for the offences specified in subsection (3) of that section, both the Bank and the Director of Corporate Enforcement.
- (6) If an auditor fails to comply with this section the auditor commits a category 1 offence.”



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