

Compliance committee members—obligations, duties and liability

Introduction

The purpose of this guide is to provide a general outline of the duties, obligations and liability of compliance committee members.

This is a guide only and does not constitute legal advice.

What is a compliance committee?

Under the *Corporations Act 2001* (Act), responsible entities are required to establish a compliance committee for the registered managed investment schemes they establish where less than half of the directors of the responsible entity are considered “external directors”.

The Act requires compliance committees to have at least three members and a majority must be “external members”. A person will generally qualify as an “external member” if they have not been substantially involved in business dealings with the responsible entity (including acting as a director) at any time in the previous two years.

If a person appointed to a compliance committee no longer qualifies as an “external member”, then they are generally required to notify the responsible entity immediately. This is likely to lead to the automatic termination of the member’s appointment as the compliance committee must have a majority of external members at all times.

Functions of the compliance committee

The compliance committee must monitor the operation of the registered scheme and the adequacy of the compliance plan.

Specifically, the functions of the compliance committee are as follows:

- Monitor the extent to which the responsible entity complies with the compliance plan for the registered scheme and report its findings to the responsible entity.
- Report to the responsible entity any breach of the Act involving the registered scheme, or any breach of the scheme’s constitution. More information on this reporting obligation is outlined below.
- If the compliance committee is of the view the responsible entity has not taken, or does not propose to take, appropriate action in respect of a breach it has reported to the responsible entity, then it must report the breach to ASIC.
- Assess at regular intervals whether the compliance plan is adequate and report the findings to the responsible entity, including recommendations about any changes it considers appropriate.

Duties as a compliance committee member

The duties of compliance committee members are set out in the Act and are as follows:

- Act honestly.
- Exercise the degree of care and diligence that a reasonable person would exercise if they were in your position.

- Not make use of information acquired from being, or make improper use of the position as, a compliance committee member in order to gain an improper advantage or cause detriment to the members of a scheme.
- Take all reasonable steps to assist ASIC during a surveillance check on the scheme or the responsible entity.
- Disclose to the compliance committee any financial interests the member has in a matter being considered by the compliance committee if that interest could conflict with the proper performance of their duties.

What types of events or issues need to be reported?

Compliance committees are required to report the following breaches to the responsible entity of the scheme if it is aware of the breach or suspects that a breach has occurred:

- Any breach of the Act involving the scheme. This may include a breach of the following provisions of the Act:
 - Duties of the responsible entity, e.g., if the responsible entity does not act in the best interests of members, if it treats members unfairly or fails to comply with the requirements of the compliance plan.
 - Meeting provisions, e.g., if the responsible entity did not comply with the notice provisions to hold a meeting of members.
 - Amendments to the constitution, e.g., if the constitution is amended without obtaining member approval where the change is adverse to members' rights.
 - AFS licence conditions, e.g., if the responsible entity fails to meet its financial requirements, such as the net tangible asset or cash needs requirements.

- Any breach of the following provisions of a scheme's constitution:
 - The consideration that is paid to acquire an interest in the scheme.
 - The powers of the responsible entity in relation to making investments or otherwise dealing with scheme property.
 - The method by which complaints made by members of the scheme are to be dealt with.
 - Winding up the scheme.

The types of events or issues discussed are examples only and are not a complete list of the possible breaches that may need to be reported.

Compliance committee members are not required to ensure that the responsible entity complies with the Act or the conditions of its AFS licence in respect of the operation of the scheme. The role of the compliance committee is limited to monitoring the operation of the scheme, as outlined above.

Can the compliance committee obtain advice or assistance?

In carrying out its functions, the compliance committee may commission independent legal, accounting or other professional advice or assistance, at the reasonable expense of the responsible entity.

Liability for the operation of the scheme or the actions of the responsible entity

Compliance committee members are generally not liable for the operation of the scheme or the actions of the responsible entity.

However, if compliance committee members breach their duties, then they may be liable for up to \$200,000 as a pecuniary penalty and damages, including diminution of the value of scheme property or loss of profits.

Can the responsible entity insure the compliance committee member?

Responsible entities are able to insure compliance committee members, except against a liability incurred as a member of the compliance committee or arising out of conduct involving a wilful breach of the member's duties.

Protective measures to discharge the obligations as a member of the compliance committee

The following is a list of practical things compliance committee members can do to limit their potential exposure to liability:

- Act honestly and in good faith.
 - Exercise powers and discharge duties with care and diligence.
 - Stay informed of issues affecting the scheme. Ask as many questions about the scheme or a particular transaction as considered necessary.
 - Be informed of matters which may affect decisions or judgements in relation to the provision of financial services, e.g., visit ASIC's website for updates and frequently asked questions, subscribe to industry publications and newsletters; and attend regular training.
 - Become a member of a compliance committee forum. Forums generally operate in every capital city.
 - Keep records of all training and factors considered when making decisions in relation to the compliance committee, including minutes of meetings.
- Read the following documents:
 - Compliance reports and minutes relating to the scheme, including breach reports and complaints.
 - The compliance plan and constitution for the scheme.
 - Disclosure documents issued for the scheme, such as a product disclosure statement (PDS) or supplementary PDS.
 - Continuous disclosure notices and website updates.
 - AFS licence conditions for the responsible entity and be aware of the obligations and duties of the responsible entity under the Act.
 - ASIC policy as it relates to the operation of the scheme.
 - Disclose any conflict of interest and ensure the position is not used to gain an advantage for the member (or someone else) or used to cause detriment to the responsible entity or a member of the scheme.
 - Review the responsible entity's insurance policy to ensure it covers compliance committee members, subject to the restrictions under the Act.
 - Obtain independent legal, accounting or other professional advice or assistance, if required.

For more information, contact—

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