



Oifig an Stiúirthóra um  
Fhorfheidhmiú Corparáideach  
Office of the Director  
of Corporate Enforcement

## **Consultation Paper C/2015/01**

### **Draft ODCE Procedures on Restriction and Disqualification Undertakings**

**27 March, 2015**

## ***Introduction***

1. While there are some modifications, the Companies Act, 2014 (the “Act”) largely replicates the earlier provisions governing the making of Declarations of Restriction or Disqualification Orders by the Courts. However, the Act introduces, for the first time, the possibility that individuals, who may be facing Restriction or Disqualification proceedings before the Courts, can avoid the costs and stresses associated with such proceedings by voluntarily agreeing to a Restriction or Disqualification. A copy of the relevant provisions, Part 14, Chapter 5, is contained in Appendix 1.
2. The ODCE has been considering what procedures it should adopt to provide for offers of Undertakings to be extended in appropriate cases. In framing its approach, the ODCE has sought to develop procedures, within the confines specified in the Act, which are practical to implement for all concerned and easily understood by those to whom undertakings may be relevant. The draft procedures that the ODCE envisages applying in most circumstances are outlined in this consultation paper. However, it should be noted that it is not practical to outline all possible situations in a document such as this and accordingly, the ODCE reserves the right to deal with any case, on its merits, in a manner that the ODCE considers appropriate and consistent with the relevant legislation. The ODCE would welcome any views of interested parties on the procedures as outlined and, in particular, would welcome responses to the following questions:

- a. Do you think that the procedures outlined are suitable, practical and appropriate?*
- b. Do you think there are any areas in which a better approach might be adopted? If so, can you please outline your proposed alternative approach?*
- c. Are there other issues or other scenarios where you feel that the ODCE should have addressed in this document?*
- d. Are there any key issues that you feel have not been addressed or have been inadequately addressed?*
- e. Are there any other comments or suggestions that you would like to offer?*

Submissions can be emailed to [info@odce.ie](mailto:info@odce.ie) or posted to the Office at 16 Parnell Square, Dublin 1. The closing date for any submissions in response to this consultation is Thursday, 30 April, 2015.

***Key Elements of the Legislation governing Undertakings***

3. The first point to note is that only the ODCE can issue an invite to give an Undertaking and, thus, for example, there is no direct role for liquidators in the process. Furthermore, the legislation does not require the ODCE to issue an invite to give an Undertaking in any case. It is a matter, entirely within the discretion of the ODCE whether, or not, to issue an invite.
4. In the case of Restriction Undertakings, they can only be given in relation to persons who were directors of insolvent companies<sup>1</sup> and would not, for example, be available as an alternative to a disqualification (an option that is available to the Courts). Furthermore, the legislation provides for a fixed 5 year term for Restriction Undertakings. Thus, there is no difference, as regards the term of a Restriction, between one imposed by order of a Court or on foot of an Undertaking. However, there would be benefits for the individuals concerned in terms of savings on legal costs, time and any stresses that might be associated with defending High Court proceedings.
5. The legislation requires that the Undertaking must be made on the basis of a prescribed form, i.e. the layout and content of the Undertaking will be set out in a Statutory Instrument. The legislation is quite specific in terms of what must be included in the form. So, for example, it must contain an outline of the circumstances, facts and allegations that establish the grounds for restriction or disqualification. The form must also contain an outline of the legal effects of the undertaking.
6. Once an invitation to submit to an undertaking is issued by the ODCE, the individual concerned will have a period of 21 days to respond if they wish to accept the invitation. ***However, there is no obligation on a person to take up any such invitation.*** An individual may also seek an extension of the period during which they can consider whether to take up the invitation. During this period, neither the ODCE nor any other person who is aware of the issue of the notice of invitation will be able to initiate proceedings for restriction or disqualification respectively on foot of the circumstances, facts and allegations set out in the notice.
7. Where an individual returns an Undertaking Acceptance Document duly signed, they will be subject to a restriction or disqualification on the same basis as if a restriction declaration or disqualification order had been made by the Courts. For example, any subsequent breach of the terms of the restriction or disqualification will be an offence and will be regarded as the same as a breach of a Court imposed restriction or disqualification.

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<sup>1</sup> This refers to persons who were directors within 12 months prior to winding up of the company

***ODCE Proposed Procedures for Restriction Undertakings***

8. Restriction Undertakings arise, solely, in the context of insolvent liquidations. Under section 56 of the Company Law Enforcement Act, 2001, liquidators are required to provide a report to the ODCE outlining the circumstances leading up to the insolvency of the company and on the actions of the directors. Furthermore, liquidators are under an obligation to apply to the Courts for the restriction of the directors of an insolvent company unless relieved of that obligation by the ODCE. A very similar requirement is enshrined in section 682 of the 2014 Act. In determining whether, or not, the directors of the insolvent company should face restriction the report of the liquidator will continue to be critical. However, the new legislation provides that, in certain circumstances, the ODCE may offer the directors the opportunity to give a Restriction Undertaking.
9. Reports received from liquidators will continue to be reviewed by ODCE Case Officers in accordance with existing practices. In some cases, there may be a need for further Reports to be submitted or for further information to be obtained from liquidators. Following the completion of these reviews and once the ODCE Case Officer is satisfied that he/she is in a position to make a final determination in the case, the ODCE currently envisages that the following procedures will apply:

***Cases where the liquidator is not seeking relief***

10. In cases where
  - a. a liquidator submits a report in which he/she indicates that he/she is not satisfied that the directors have demonstrated that they acted honestly and responsibly in relation to the affairs of the company and, accordingly, that he/she is not seeking to be relieved from the obligation to apply for the restriction of the directors; and
  - b. the ODCE is satisfied that the liquidator has advised the directors of his/her recommendation and the reasons for it; and
  - c. the ODCE Case Officer agrees with that assessment,

the ODCE will issue a notification to the liquidator indicating that he/she is not relieved and is therefore under an obligation to apply to the Courts for the restriction of the directors of the company. However, the ODCE will generally issue an Invitation to submit to a Restriction Undertaking to each of the directors involved at the same time, (see paragraph below outlining the circumstances in which we will issue an invitation).

Once such an invitation has been issued, the liquidator will be precluded from initiating restriction proceedings and accordingly, the obligation to apply to the Courts will, in effect, be stayed.

11. If all of the directors involved submit a signed Restriction Acceptance Form within the prescribed time limits, details of the restrictions then applicable will be filed with the CRO and the ODCE will issue copies of these notifications to the liquidator. Furthermore, the ODCE will confirm that the liquidator is no longer required to proceed with an application to the Courts for a restriction declaration in respect of the directors.
12. If none of the directors submit signed undertakings within the time limits, the ODCE will notify the liquidator accordingly and the liquidator will then be under an obligation to proceed with an application to the Courts for a restriction declaration in respect of each of those directors.
13. If only some of the directors submit signed undertakings within the time limits, then
  - a. details of the restrictions in respect of those who have submitted Undertakings will be filed with the CRO (and copied to the liquidator) and the liquidator will not have to proceed with an application to the Courts for restriction declaration in respect of those directors; and
  - b. the ODCE will issue a notification to the liquidator identifying any directors who did not submit Undertakings and the liquidator will then be required to proceed with an application to the Courts in respect of those directors.

***Cases where the liquidator does seek to be relieved but ODCE considers that the directors should face Restriction***

14. In some cases, a liquidator may submit a report in which he/she expresses the opinion that the directors have demonstrated that they acted honestly and responsibly in relation to the affairs of the company but where the ODCE Case Officer, having reviewed the case, considers that restriction proceedings are appropriate. In these cases, the Case Officer will generally engage with the liquidator outlining the basis for his or her conclusions that the directors should face restriction and the liquidator will be afforded an opportunity to respond to the conclusions reached by the Case Officer.
15. If following the engagement outlined in paragraph 14, the liquidator accepts that restriction proceedings are appropriate, then the procedures outlined in paragraphs 10 – 13 will be applied. However, if the liquidator remains of the view that the directors

have acted honestly and responsibly and the Case Officer still holds to the view that the directors should face restriction proceedings, then the following procedures will apply:

- a. Having regard to the fact that the liquidator will have sought relief, the directors concerned may not be on notice that they could be facing Restriction proceedings. In these circumstances, the ODCE believes that they should be afforded an opportunity to respond to the “circumstances, facts and allegations” upon which the Case Officer considers that they should face restriction. Accordingly, the ODCE will correspond directly with the directors advising them of the circumstances, facts and allegations considered relevant by the ODCE and they will be afforded an opportunity to set out their response to the issues outlined within a specified time limit.
- b. If, having taken account of any submissions that the directors may have made, the Case Officer is still of the view that Restriction proceedings are appropriate, then the ODCE will generally:
  - i. Issue a final determination to the liquidator advising them that they have not been relieved of the obligation to apply for the restriction of the directors; and
  - ii. Issue an Invitation to submit to a Restriction Undertaking to each of the directors involved (see paragraph 16 below outlining the circumstances in which we may not issue an invitation). The ODCE will notify the liquidator that these invitations have issued and the requirement to make the restriction application will, effectively, be stayed until the period for response by the directors has expired. The procedures outlined in paragraphs 11 -13 will then apply.

***Circumstances in which the ODCE may decide not to issue invitations to submit to a Restriction Undertaking***

16. In most cases where the ODCE considers that restriction is appropriate, an invitation to submit a Restriction Undertaking will be issued at the appropriate time. However, the ODCE may decide not to issue such invitations in some circumstances. For example, if the ODCE considers that the facts of the case warrant further investigation with a view to the taking of disqualification proceedings, other civil proceedings or criminal prosecution, invitations may not issue. The ODCE also reserves the right not to issue invitations in any cases where it considers that the public interest would be better served by allowing the matter be determined by the Courts.

### ***Time limits for Restriction Proceedings***

17. The time limits for making an application for the restriction of directors of an insolvent company are set out in section 683(4) of the Companies Act, 2014. The section provides that such applications should be made within 2 months from the date the ODCE has notified the liquidator that he/she has not been relieved or such great period as the ODCE may allow.
18. However, in cases where the ODCE invites the directors concerned to submit an undertaking, the liquidator will be precluded from making any restriction application for the duration of the period in which the directors can decide whether, or not, to submit an undertaking. In any such instances, the ODCE may, at its discretion, consider extending the period in which subsequent applications have to be made by liquidators to take account of the time afforded to the directors to consider whether, or not, they wish to submit an undertaking.

### ***Relief Applications***

19. Notwithstanding that directors may have voluntarily submitted to a Restriction, the legislation does confer on them the right to apply to the Courts at any time during the currency of the restriction seeking to be relieved, in whole or in part, from the terms of the restriction. While the ODCE respects the right of directors to make such applications, it will be anxious to ensure that the integrity of the process is respected. In particular, the ODCE will generally oppose any efforts made as part of any such applications that seek to revisit or challenge the circumstances, facts and allegations that formed the basis for the Undertaking in the first instance. Furthermore, as part of the Restriction Acceptance Document, there will be a requirement to accept that the circumstances, facts and allegations, as outlined, are not disputed.

***ODCE Proposed Procedures for Disqualification Undertakings***

20. Most disqualifications arise on foot of proceedings taken by the ODCE or by liquidators (but can be taken by other parties on occasion). In recent years, a number of directors have been disqualified on foot of applications made by the ODCE in respect of cases where the directors have allowed companies to be struck off the Companies Register while they had significant outstanding debts. In a small number of cases, proceedings have been taken on other grounds specified in Section 160 of the Companies Act 1990, including cases where the directors have been suspected of being guilty of breaches of their duties as directors or their conduct has made them unfit to be concerned in the management of a company.
21. Disqualification proceedings taken by the ODCE will usually be taken on foot of investigations carried out by the ODCE. Such investigations can be initiated by the ODCE itself or be carried out in response to a complaint from a 3<sup>rd</sup> party such as a creditor, shareholder or liquidator. Proceedings taken by liquidators generally arise from their investigations of the company in liquidation where the liquidators form the view that restriction is not a sufficient response to the actions of the directors in the period prior to liquidation.

***Cases where ODCE forms the view that disqualification is appropriate***

22. Where following an investigation carried out by it, the ODCE forms the view that disqualification is appropriate and that the appropriate period of disqualification is not greater than 5 years, it may issue an invitation to submit to a Disqualification Undertaking. The individual concerned will then have a fixed period of time, usually 21 days, to respond to that invitation. In addition, they will be able to request an extension of that period. Where the grounds for such requests are reasonable and the time extension requested limited, the ODCE may, at its discretion, grant the extension requested. However, the ODCE reserves the right to refuse such requests. During this "offer" period, the ODCE will be precluded from initiating disqualification proceedings against the individual concerned. In addition, any other person who is aware of the "offer" will be similarly constrained.
23. Where the individual concerned returns a signed Disqualification Acceptance Document, the CRO will be notified and the person will stand disqualified for the period set out in the "offer" document. If the individual does not return the form, the ODCE will generally proceed with legal proceedings seeking the disqualification of the person concerned.



***Period of Disqualification***

24. The legislation only permits the ODCE to offer a Disqualification Undertaking for a maximum duration of 5 years. Where the ODCE forms the view that a longer term of disqualification is appropriate, an invitation to submit to a Disqualification Undertaking will not be made. A shorter duration may be proposed where the circumstances of the case warrant it. This will be determined by the ODCE on a case by case basis having regard to all of the circumstances of the case and any relevant jurisprudence.

***Cases where a 3<sup>rd</sup> party forms the view that disqualification is appropriate***

25. Section 844 of the Act permits a range of 3<sup>rd</sup> parties, including shareholders, officers, employees, receivers, liquidators, examiners or creditors of a company, to apply for the disqualification of individuals involved in a number of specified capacities with the company. It is expected that most applications on foot of this power will arise where a liquidator forms the view that the directors of the company, or some of them, should face disqualification. The basis for such a view will generally arise from the liquidator's investigation of the affairs of the company in liquidation.
26. The legislation governing undertakings does not permit 3<sup>rd</sup> parties to extend an invitation to provide a Disqualification Undertaking. However, in such cases, the ODCE may be prepared to consider issuing an invitation to submit a Disqualification Undertaking. A precondition to any such consideration is that the ODCE is satisfied that the party seeking the issue of the undertaking
- a. has sufficient, appropriate evidence that could reasonably be expected to support the making of a disqualification order; and
  - b. is committed to making a disqualification application in the event that the relevant individuals decide not to avail of the offer of an Undertaking.
27. Where the ODCE is approached with a view to issuing an invitation to particular individuals it may seek whatever information or evidence that it considers appropriate in order to satisfy itself regarding the details set out in paragraph 26 above. This could, for example, include copies of any legal advice received by the 3<sup>rd</sup> party regarding the matter, a draft of an affidavit that would ground any subsequent disqualification application or any other information or evidence that it may require. It may in some instances also seek access to the books and records of the 3<sup>rd</sup> party and/or the company.

28. The integrity of the process requires that Disqualification Undertakings should be invited only where it is considered that there is a reasonable prospect that a disqualification order would be made if an application were to be made to the Courts for such an order. It would also be essential, where invitations are issued, that the individuals concerned are aware that they will, in all likelihood, face disqualification proceedings if they do not return the Undertaking.

### **Relief Applications**

29. Notwithstanding that directors may have voluntarily submitted to a Disqualification, the legislation does confer on them the right to apply to the Courts at any time during the currency of the disqualification seeking to be relieved, in whole or in part, from the terms of the disqualification. While the ODCE respects the right of individuals to make such applications, it will be anxious to ensure that the integrity of the process is respected. In particular, the ODCE will generally oppose any efforts made as part of such applications that seek to revisit or challenge the circumstances, facts and allegations that formed the basis for the Undertaking in the first instance. Furthermore, as part of the Disqualification Acceptance Document, there will be a requirement to accept that the circumstances, facts and allegations, as outlined, are not disputed.

### ***Layout of Undertakings***

30. Copies of the draft Invitations to submit to a Restriction Undertaking and Invitations to submit to a Disqualification Undertaking are included at Appendix 2 and Appendix 3 respectively. The forms are laid out in 4 parts:

- Part A: Invitation to Submit to a Restriction/Disqualification Undertaking;
- Part B: Particulars of the Circumstances Facts and Allegations that have given rise to the belief that a Restriction/Disqualification is appropriate;
- Part C: Restriction/Disqualification Acceptance Document
- Part D: Legal effects of a Restriction/Disqualification Undertaking

31. A key feature of the forms is the recommendation that any individual who is contemplating accepting an Undertaking should seek independent legal advice.

**Appendix 1**

**Copy of main legislative provisions**

## CHAPTER 5

### *Disqualification and restriction undertakings*

#### **Definitions (Chapter 5)**

**849.** In this Chapter—

“disqualification” means being disqualified from being appointed or acting as a director or other officer, receiver, statutory auditor, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of each of the following:

- (a) any company within the meaning of *section 819(6)*;
- (b) any friendly society within the meaning of the Friendly Societies Acts 1896 to 2014;
- (c) any society registered under the Industrial and Provident Societies Acts 1893 to 2014;

“disqualification acceptance document” means the document provided for by regulations under *section 854(1)* and referred to in *paragraph (a)(i)* of that provision;

“disqualification order” means an order made under *section 842*;

“disqualification undertaking”, in relation to a person, means an undertaking by the person, given by the means provided in this Chapter, by which the person submits himself or herself to be subject to disqualification;

“restriction” means being restricted for a period of 5 years from being appointed or acting in any way, directly or indirectly, as a director or secretary of a company (within the meaning of *section 819(6)*) or being concerned in or taking part in the promotion or formation of a company (within that meaning) unless the company meets the requirements set out in *section 819(3)*;

“restriction acceptance document” means the document provided for by regulations under *section 854(1)* and referred to in *paragraph (a)(ii)* of that provision;

“restriction declaration” means a declaration made under *section 819*;

“restriction undertaking”, in relation to a person, means an undertaking by the person, given by the means provided in this Chapter, by which the person submits himself or herself to be subject to restriction.

**Disqualification undertaking — initiation of procedure that provides person opportunity to submit to disqualification**

**850.** (1) In this section—

“disqualification period” shall be read in accordance with *subsection (3)(b)*;

“notice period” shall be read in accordance with *subsection (3)(d)*;

“person” shall be read in accordance with *subsection (2)*;

“specified date” shall be read in accordance with *subsection (3)(c)*;

“underlying facts and circumstances” shall be read in accordance with *subsection (3)(a)*.

(2) Subject to *section 851(6)*, where the Director has reasonable grounds for believing that one or more of the circumstances specified in *section 842(a)* to (i) applies to a person (in this section referred to as the “person”), the Director may, in his or her discretion, deliver to the person, or to the person’s duly authorised agent, the following notice.

(3) That notice is a notice in the prescribed form stating—

(a) both—

(i) which of the circumstances specified in *section 842(a)* to (i) the Director believes apply to the person; and

(ii) particulars of the facts and allegations that have given rise to that belief;

and the circumstances so stated, and the facts and allegations that have given rise to that belief (and of which particulars are so stated), are referred to together in this section as the “underlying facts and circumstances”;

(b) the period of disqualification (referred to in this section as the “disqualification period”) which, in the Director’s opinion, is warranted in relation to the person by the underlying facts and circumstances;

(c) the date (referred to in this section as the “specified date”) that will, subject to

*subsection (5)*, be the date of commencement of the disqualification period, if a disqualification undertaking is given by the person;

(d) that during—

(i) such period as may be specified in the notice (referred to in this section as the “notice period”), being a period beginning on a day falling not less than 21 days after the date of the notice and expressed to end immediately before the specified date; or

(ii) in the event of a request under *subsection (5)* by the person being acceded to, the notice period as extended in pursuance of that subsection;

the person may—

(I) notify the Director, in the prescribed form, of his or her willingness to give a disqualification undertaking for the disqualification period; and

(II) return to the Director the disqualification acceptance document duly signed;

(e) that during the notice period, or that period as so extended, the Director will refrain from making an application in respect of the person under *section 842* arising from or in connection with the underlying facts and circumstances;

(f) that if the person, within the notice period or that period as so extended, does the things referred to in *paragraph (d)(I) and (II)*, the Director shall not, after the expiry of that period, make an application in respect of the person under *section 842* arising from or in connection with the underlying facts and circumstances.

(4) That notice shall also state—

(a) that the person may make a request, under *subsection (5)*, for an extension of the notice period,

(b) the legal effect (for the person) of giving a disqualification undertaking for the disqualification period beginning on the specified date, and

(c) that if the person gives a disqualification undertaking—

(i) the person may seek to be relieved (whether in whole or in part) from the undertaking only by applying to the court under *section 847*, and

(ii) that, on the making of such an application, the court may grant such relief only if it considers it just and equitable to do so, and then only on the terms and conditions as it sees fit.

(5) Where a notice is delivered under *subsection (2)*, the Director may, at any time before the specified date, on the request of the person, where the Director considers it appropriate to do so for the purposes of extending the notice period (and postponing the commencement of the proposed disqualification period in consequence), substitute a later date for the specified date and, where such a date is so substituted, references in *section 851*—

(a) to the notice period shall be read as references to the notice period as extended in pursuance of this subsection, and

- (b) to the specified date shall be read as references to the date that has been substituted for it in pursuance of this subsection.

**Effect of delivery of notice under *section 850*, giving of disqualification undertaking on foot thereof and related matters**

- 851.** (1) Where a notice is delivered under *section 850(2)*, the Director and every person who is aware of the notice shall not, during the notice period, make an application under *section 842*, arising from or in connection with the underlying facts and circumstances, in respect of the person who is the subject of the notice.
- (2) *Subsections (3) to (5)* apply where a person, the subject of a notice delivered under *section 850(2)*, has, within the notice period—
- (a) notified the Director, in the prescribed manner, of his or her willingness to give a disqualification undertaking for the disqualification period, and
- (b) returned to the Director the disqualification acceptance document duly signed.
- (3) The Director shall, as soon as practicable—
- (a) cause the Registrar to be furnished with the prescribed particulars of the disqualification undertaking at such time and in such form and manner as may be prescribed, and the Registrar shall enter the prescribed particulars in the register of persons kept under *section 864*, and
- (b) notify the person of the prescribed particulars of the disqualification undertaking furnished to the Registrar and provide the person with a copy of the disqualification acceptance document executed by or on behalf of the Director.
- (4) After the expiry of the notice period, neither the Director nor any other person shall make an application under *section 842*, arising from or in connection with the underlying facts and circumstances, in respect of the person who has given the disqualification undertaking.
- (5) For the duration of the disqualification period beginning on the specified date, the person who has given the disqualification undertaking—
- (a) shall not be appointed or act as a director or other officer, statutory auditor, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of each of the following:
- (i) any company within the meaning of *section 819(6)*;
- (ii) any friendly society within the meaning of the Friendly Societies Acts 1896 to 2014;
- (iii) any society registered under the Industrial and Provident Societies Acts 1893 to 2014;
- and
- (b) shall be deemed, for the purposes of this Act, to be subject to a disqualification

order.

- (6) The Director shall not exercise his or her power under *section 850(2)* in relation to a person where—
- (a) in the Director's opinion, a period of disqualification, in relation to the person, that is longer than 5 years is warranted by the underlying facts and circumstances, or
  - (b) the Director is aware that an application under *section 842* has already been made in respect of the person arising from or in connection with the underlying facts and circumstances.
- (7) Where the person who has given the disqualification undertaking (the "immediate undertaking") is already disqualified by virtue of an earlier disqualification undertaking or disqualification order, the period specified in the immediate undertaking shall run concurrently with the remaining period for which the person is already subject to disqualification.
- (8) In this section—
- (a) without prejudice to *section 850(5)*, "specified date" and "notice period" are to be read in accordance with *section 850(3)(c)* and *(d)*, respectively,
  - (b) "person", "underlying facts and circumstances" and "disqualification period" are to be read in accordance with *section 850(2)*, *(3)(a)* and *(3)(b)*, respectively.

**Restriction undertaking — initiation of procedure that provides person opportunity to submit to restriction**

**852.** (1) In this section—

"notice period" shall be read in accordance with *subsection (3)(c)*;

"person" shall be read in accordance with *subsection (2)*;

"restriction period" means the period of 5 years, as mentioned in the definition of "restriction" in *section 849*, for which the restrictions set out in that definition are to operate;

"specified date" shall be read in accordance with *subsection (3)(b)*;

"underlying facts and circumstances" shall be read in accordance with *subsection (3)(a)*.

- (2) Subject to *section 853(6)*, where the Director has reasonable grounds for believing that a person falls within the description of the second-mentioned person in *section 819(1)*, namely a person who was a director of an insolvent company within the meaning of *Chapter 3* (in this section referred to as the "person"), the Director may, in his or her discretion, deliver to the person, or to the person's duly authorised agent, the following notice.
- (3) That notice is a notice in the prescribed form stating—
- (a) the circumstances, facts and allegations that have given rise to that belief of the



Director, citing the provisions of *section 819(1)* and *section 818(1)* (and also, where appropriate, *section 824*) and stating particulars of those facts and allegations (and the circumstances so stated, and those facts and allegations, of which particulars are so stated, are referred to together in this section as the “underlying facts and circumstances”),

- (b) the date (referred to in this section as the “specified date”) that will, subject to *subsection (5)*, be the date of commencement of the restriction period, if a restriction undertaking is given by the person,

- (c) that during—

- (i) such period as may be specified in the notice (referred to in this section as the “notice period”), being a period beginning on a day falling not less than 21 days after the date of the notice and expressed to end immediately before the specified date; or

- (ii) in the event of a request under *subsection (5)* by the person being acceded to, the notice period as extended under that subsection;

the person may—

- (I) notify the Director, in the prescribed form, of his or her willingness to give a restriction undertaking; and

- (II) return to the Director the restriction acceptance document duly signed;

- (d) that during the notice period, or that period as so extended, the Director will refrain from making an application in respect of the person under *section 819* arising from or in connection with the underlying facts and circumstances;

- (e) that if the person, within the notice period or that period as so extended, does the things referred to in *paragraph (c)(I)* and *(II)*, the Director shall not, after the expiry of that period, make an application in respect of the person under *section 819* arising from or in connection with the underlying facts and circumstances.

- (4) That notice shall also state—

- (a) that the person may make a request, under *subsection (5)*, for an extension of the notice period,

- (b) the legal effect (for the person) of giving a restriction undertaking beginning on the specified date, and

- (c) that if the person gives a restriction undertaking—

- (i) the person may seek to be relieved (whether in whole or in part) from the undertaking only by applying to the court under *section 822*, and

- (ii) that, on the making of such an application, the court may grant such relief only if it considers it just and equitable to do so, and then only on the terms and conditions as it sees fit.

- (5) Where a notice is delivered under *subsection (2)*, the Director may, at any time before the specified date, on the request of the person, where the Director considers it

appropriate to do so for the purposes of extending the notice period (and postponing the commencement of the restriction period in consequence), substitute a later date for the specified date and, where such a date is so substituted, references in *section 853*—

- (a) to the notice period shall be read as references to the notice period as extended in pursuance of this subsection, and
- (b) to the specified date shall be read as references to the date that has been substituted for it in pursuance of this subsection.

**Effect of delivery of notice under *section 852*, giving of restriction undertaking on foot thereof and related matters**

- 853.** (1) Where a notice is delivered under *section 852(2)*, the Director and every person who is aware of the notice shall not, during the notice period, make an application under *section 819*, arising from or in connection with the underlying facts and circumstances, in respect of the person who is the subject of the notice.
- (2) *Subsections (3) to (5)* apply where a person, the subject of a notice delivered under *section 852(2)*, has, within the notice period—
- (a) notified the Director, in the prescribed manner, of his or her willingness to give a restriction undertaking, and
  - (b) returned to the Director the restriction acceptance document duly signed.
- (3) The Director shall, as soon as practicable—
- (a) cause the Registrar to be furnished with the prescribed particulars of the restriction undertaking at such time and in such form and manner as may be prescribed, and the Registrar shall enter the prescribed particulars in the register of persons kept under *section 823*, and
  - (b) notify the person of the prescribed particulars of the restriction undertaking furnished to the Registrar and provide the person with a copy of the restriction acceptance document executed by or on behalf of the Director.
- (4) After the expiry of the notice period, neither the Director nor any other person shall make an application under *section 819*, arising from or in connection with the underlying facts and circumstances, in respect of the person who has given the restriction undertaking.
- (5) For the duration of the restriction period beginning on the specified date, the person who has given the restriction undertaking—
- (a) shall not be appointed or act in any way, directly or indirectly, as a director or secretary of a company (within the meaning of *section 819(6)*) or be concerned in or take part in the promotion or formation of a company (within that meaning) unless the company meets the requirements set out in *section 819(3)*, and
  - (b) shall be deemed, for the purposes of this Act, to be subject to a restriction declaration.

- (6) The Director shall not exercise his or her power under *section 852(2)* in relation to a person where the Director is aware that an application under *section 819* has already been made in respect of the person arising from or in connection with the underlying facts and circumstances.
- (7) Where the person who has given the restriction undertaking (the “immediate undertaking”) is already restricted by virtue of an earlier restriction undertaking or restriction declaration, the period specified in the immediate undertaking shall run concurrently with the remaining period for which the person is already subject to restriction.
- (8) In this section—
  - (a) without prejudice to *section 852(5)*, “specified date” and “notice period” are to be read in accordance with *section 852(3)(b)* and *(c)*, respectively,
  - (b) “restriction period”, “person” and “underlying facts and circumstances” are to be read in accordance with *section 852(1)*, *(2)* and *(3)(a)*, respectively.

**Regulations for the purposes of sections 850 to 853**

**854.** (1) The Minister shall make regulations requiring—

- (a) that a document, in a form specified in the regulations, to be known as—
    - (i) in the case of *sections 850* and *851*, a “disqualification acceptance document”; and
    - (ii) in the case of *sections 852* and *853*, a “restriction acceptance document”;  
(being the document by which the person to whom a notice delivered under *section 850(2)* or *852(2)*, as the case may be, relates signifies in writing (if such be the person’s decision) the person’s voluntary submission to disqualification or restriction, as appropriate, in accordance with this Chapter) shall be returned by the person within the relevant notice period to the Director; and
  - (b) that, on receipt of that document, the Director shall execute, or cause to be executed, on his or her part the document by the affixing of his or her seal to it.
- (2) Regulations under *subsection (1)* may contain such consequential and supplemental provisions for the purposes of those regulations or for the purpose of giving further effect to *sections 850* to *853* as the Minister thinks expedient, including—
- (a) provision for particular procedures to be employed by the Director in relation to the delivery of a notice under *section 850(2)* or *852(2)* or any communication between the Director and the person concerned or his or her duly authorised agent consequent on the delivery of such a notice (a “post-delivery-of notice communication”), and
  - (b) provision for a like privilege to legal professional privilege to attach to a post-delivery-of notice communication.
- (3) This section is in addition to the powers under *section 12(1)* to prescribe anything referred to in *sections 850* to *853* as prescribed or to be prescribed.

## Appendix 2

### Draft Invitation to submit to a Restriction Undertaking



## Statutory Notice

### Part A

#### Invitation to Submit to a Restriction Undertaking

ODCE Case Ref. No. \_\_\_\_\_

RU No. \_\_\_\_\_

To: \_\_\_\_\_

Of: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

1. I, \_\_\_\_\_<sup>1</sup>,

a. have reasonable grounds for believing that you were a director<sup>2</sup> of \_\_\_\_\_, an insolvent company within the meaning of *Chapter 3* of Part 14 of the Companies Act, 2014 (hereinafter referred to as “the Act”); and

b. by reason of the circumstances, facts and allegations outlined in Part B hereto (hereinafter referred to as the “underlying facts and circumstances”), I have formed the opinion that a period of Restriction<sup>3</sup>, in accordance with Section 819 of the Act, is warranted in relation to you.

2. During the period from \_\_\_\_\_ to \_\_\_\_\_, (or such extended period as may be permitted by me in accordance with paragraph 5 below), you may notify me that you are willing to give a Restriction Undertaking by returning to me the Restriction Acceptance Document duly signed (contained in Part C). During this period, the Director of Corporate Enforcement (and every other person who is aware of this notice) will be precluded from making an application to the Court for a Declaration of Restriction, under *section 819* of the Act, in respect of you arising from, or in connection with, the underlying facts and circumstances.

<sup>1</sup> The Director of Corporate Enforcement OR an officer of the Director of Corporate Enforcement to whom the relevant powers of the Director have been duly delegated pursuant to Section 952(1) of the Act.

<sup>2</sup> “director” in this context includes a shadow or de facto director.

<sup>3</sup> In accordance with Section 819 of the Act, Restriction is for a standard 5 year period.

3. Where a valid Restriction Acceptance Document has been submitted to this Office within the specified deadlines,
- a. you will be restricted in accordance with Section 849 of the Act for a period of 5 years commencing on \_\_\_\_\_ (or such later date as may be permitted by me in accordance with paragraph 5 below);
  - b. the Director of Corporate Enforcement (and every other person who is aware of this notice) will be precluded from making an application to the Court for a Declaration of Restriction, under *section 819* of the Act, in respect of you arising from, or in connection with, the underlying facts and circumstances; and
  - c. your name will be entered into the Register of Restricted Persons maintained by the Registrar of Companies.
4. Notwithstanding that you have given a Restriction Undertaking, *section 822* of the Act permits you to apply to the High Court for relief from the Restriction (in whole or in part). The court may grant such relief only if it considers it just and equitable to do so, and then only on the terms and conditions that the court sees fit.
5. You may, if you wish, make a request for an extension of the notice period specified in paragraph 2 (and a corresponding postponement of the commencement of the proposed restriction period). However, such a request **must** be made before the end of the period specified in paragraph 2 above.
6. A summary of the legal effects for you of giving a restriction undertaking is outlined in Part D of this Notice. Given the significant implications for you, **it is strongly recommended that you seek independent legal advice in relation to this matter before you consider signing the Restriction Acceptance Document.**

Dated this \_\_\_\_ day of \_\_\_\_\_ 20\_\_

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

Position: \_\_\_\_\_

Phone No: \_\_\_\_\_

Email: \_\_\_\_\_

## Part B

*Particulars of the Circumstances, Facts and Allegations That Have Given Rise to the Belief  
and Opinion Referred to in Paragraph 1 of Part A.*

DRAFT

In the event that you decide not to accept this invitation to provide a Restriction Undertaking or that you subsequently decide to apply for relief from a restriction, the ODCE reserves the right to introduce such further or supplementary evidence as it considers appropriate in relation to the circumstances, facts and allegations outlined above in any Court proceedings that might ensue.

## Part C

### Restriction Acceptance Document

#### SECTIONS 852 TO 854 OF THE COMPANIES ACT 2014

[1] I, \_\_\_\_\_

Date of Birth: \_\_\_\_\_

Address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

hereby signify, in writing, my voluntary submission to restriction, in accordance with Chapter 5 of Part 14 of the Companies Act 2014 for the period of 5 years beginning on \_\_\_\_\_.

[2] The scope and effect of the restriction undertaking to which, in consequence of this acceptance, I will become subject has been explained to me in Part D of this Notice. In particular, I have noted that, in the event that I act in contravention of the restriction undertaking to which I am hereby submitting, I will be at risk of

- (i) being prosecuted for a criminal offence; and/or,
- (ii) becoming the subject of a disqualification order; and/or
- (iii) becoming personally liable, without any limitation of liability, for all or part of the debts of a company.

[3] Solely for the purposes of Chapter 5 of Part 14 of the Companies Act 2014, and for any other purposes consequential to the giving of a restriction undertaking (including, in particular, any future application for relief under *section 822* of the Companies Act 2014), I confirm that I do not dispute the underlying facts and circumstances as set out in Part B of this Notice.

[4] I acknowledge that I have been strongly advised, in Part D of this Notice, to obtain independent legal advice before deciding to give a restriction undertaking. I confirm that I have duly noted this advice and that I understand the consequences of signing this Undertaking.



**SIGNED** by the said \_\_\_\_\_

On the [ ] day of [ ] 20[ ]

in the presence of:

\_\_\_\_\_  
**Name:**

**Address:**

**Occupation:**

**PRESENT** when the Common Seal  
of the Director of Corporate  
Enforcement was affixed hereto:

## Part D

### Legal Effects of a Restriction Undertaking

#### Effect of Restriction

- A. If you submit a signed Restriction Acceptance Document, you will be restricted for a period of 5 years from being appointed or acting in any way, directly or indirectly, as a director or secretary of, or being concerned in, or taking part in the promotion or formation of,:

- a. a private company limited by shares;
- b. a designated activity company;
- c. a public limited company;
- d. a company limited by guarantee;
- e. an unlimited company;
- f. an unregistered company;
- g. an Irish Collective Asset management Vehicle (ICAV);

unless the company or ICAV meets the requirements set out in section 819(3) of the Act.

- B. The requirements referred to in *section 819(3)* are—

- a. the company shall have an allotted share capital of nominal value not less than—
  - (a) €500,000 in the case of a public limited company (other than an investment company) or a public unlimited company, or
  - (b) €100,000 in the case of any other company,
- b. each allotted share shall be paid up to an aggregate amount not less than the amount referred to in *paragraph (a)*, including the whole of any premium on that share, and
- c. each allotted share and the whole of any premium on each allotted share shall be paid for in cash.

- C. In the case of a **company limited by guarantee**, the following requirements shall apply instead of the foregoing:

- a. that the company's memorandum of association specifies that the amount of the contribution on the part of the member of it, or at least one member of it, being the contribution undertaken to be made by the member as mentioned in *section 1176(2)(d)*, is not less than €100,000;

- b. that the member whose foregoing contribution is to be not less than that amount is an individual, as distinct from a body corporate.
- D. In the case of an **investment company** or an Irish Collective Asset management Vehicle (ICAV), the subsection shall be read as if it set out both of the following requirements—
  - a. that the value of the issued share capital of the company or ICAV is not less than €100,000,
  - b. that an amount of not less than €100,000 in cash has been paid in consideration for the allotment of shares in the company.
- E. Following the submission of the undertaking, your name will be entered into the Register of Restricted Persons maintained by the Registrar of Companies. This will be accessible by the general public for the duration of the period of your restriction.

#### **Breach of Restriction Undertaking**

- F. If you fail to comply with the terms of your restriction undertaking, you are liable to be prosecuted for a criminal offence under section 855 of the Act. If convicted of such an offence, you are liable to a fine and/or imprisonment and, in addition, the imposition of a period of disqualification. Under section 859 of the Act, it is also possible that you could be held personally liable, without any limitation of liability, for all, or part of, the debts or other liabilities of any company in relation to which you have acted in a manner or a capacity that you are prohibited from doing by virtue of being subject to a restriction undertaking.

#### **Other Effects**

- G. You will be deemed, for the purposes of the Act, to be subject a declaration of restriction, being an order of the type ordinarily made by the courts under section 842 of the Act. This may give rise to consequences under other legislative codes. For example, the fact that you were or had been deemed subject to restriction under the Companies Act might have a bearing on whether you could be an attorney under an enduring power of attorney.

#### **Relief Application**

- H. Even where you give a Restriction Undertaking, *section 822* of the Act permits you to apply to the High Court subsequently seeking to be relieved (whether in whole or in part) from the Restriction. The court may grant such relief only if it considers it just and equitable to do so, and then only on the terms and conditions that the court sees fit. Furthermore, the ODCE reserves the right to oppose any such application. In this regard, you should also note that, as part of your acceptance of a Restriction Undertaking, you will have accepted that the underlying facts and circumstances outlined in Part B are not disputed.

#### **No Obligation to give an Undertaking**

- I. **There is absolutely no obligation on you to give an undertaking.** However, if you decide that you do not wish to voluntarily submit to a restriction undertaking, then you should be aware that it is likely that an application will be made to the High Court to have you restricted.
- J. You should also keep in mind that the courts may direct that the restricted person shall bear not just the costs of the application to court but also some or all of the costs incurred by the ODCE, the Director of Public Prosecutions, a liquidator, receiver or examiner, in investigating the matter and in collecting evidence in respect of those matters such portion of the applicant's remuneration and expenses as are attributable to such investigation and collection.
- K. Where you decline to give the undertaking within the deadlines specified and on the terms outlined in this document and an application to have you restricted is subsequently made under *section 820* of the Act arising from or in connection with the underlying facts and circumstances, it will not be open to you to seek to settle, or discontinue, those legal proceedings by offering an undertaking at some later date. Under Section 853(6) of the Act the ODCE is specifically precluded from offering a restriction undertaking once application to the High Court has been made (including any application, of which the ODCE is aware, brought by anyone else such as a liquidator or a receiver).

#### **Recommendation to obtain independent Legal Advice**

- L. The foregoing is simply an outline of the key legal effects, under Irish statute law, for a person who has given a restriction undertaking. In particular cases, the giving of such an undertaking might also have consequences in private law, for example, under a contract of employment or in a contract relating to the lending of money. It is not possible, in a document of this sort, for every conceivable legal effect to be stated comprehensively, in a manner which is appropriately tailored to the particular circumstances of particular persons.
- M. **Accordingly it is strongly recommended that you should seek independent legal advice before deciding to give a restriction undertaking.**

## Appendix 3

### Draft Invitation to submit to a Disqualification Undertaking



## Statutory Notice

### Part A

#### Opportunity to Submit to a Disqualification Undertaking

ODCE Case Ref. No. \_\_\_\_\_

DU No. \_\_\_\_\_

To: \_\_\_\_\_

Of: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

1. I, \_\_\_\_\_<sup>1</sup>, have reasonable grounds for believing that the circumstance, or circumstances, outlined in Part B1 applies to you. Particulars of the facts and allegations that have given rise to this belief are outlined in Part B2 hereto. By reason of the underlying circumstances, facts and allegations outlined in Part B (hereinafter referred to as the "underlying facts and circumstances"), I have formed the opinion that a period of disqualification with a duration of \_\_\_\_\_ is warranted in relation to you.
2. During the period from \_\_\_\_\_ to \_\_\_\_\_, (or such extended period as may be permitted by me in accordance with paragraph 5 below), you may notify me that you are willing to give a Disqualification Undertaking by returning to me the Disqualification Acceptance Document duly signed (contained in Part C). During this period, the Director of Corporate Enforcement (and every other person who is aware of this notice) will be precluded from making an application to the Court for a Disqualification Order, under section 842 of the Act, in respect of you arising from, or in connection with, the underlying facts and circumstances.
3. Where a valid Disqualification Acceptance Document has been submitted to this Office within the specified deadlines,
  - a. you will be disqualified in accordance with Section 838 of the Act for the period specified in paragraph 1 above with effect from \_\_\_\_\_ (or such later date as may be permitted by me in accordance with paragraph 5 below);

<sup>1</sup> The Director of Corporate Enforcement OR an officer of the Director of Corporate Enforcement to whom the relevant powers of the Director have been duly delegated pursuant to Section 952(1) of the Act.

- b. the Director of Corporate Enforcement (and every other person who is aware of this notice) will be precluded from making an application to the Court for a Disqualification Order, under *section 842* of the Act, in respect of you arising from, or in connection with, the underlying facts and circumstances; and
- c. your name will be entered into the Register of Disqualified Persons maintained by the Registrar of Companies.
4. Notwithstanding that you may have given a Disqualification Undertaking, *section 847* of the Act permits you to apply to the High Court for relief from the disqualification (in whole or in part). The court may grant such relief only if it considers it just and equitable to do so, and then only on the terms and conditions that the court sees fit.
5. You may, if you wish, make a request for an extension of the notice period specified in paragraph 2 (and a corresponding postponement of the commencement of the proposed disqualification period). However, such a request **must** be made before the end of the period specified in paragraph 2 above.
6. In the event that you decide not to accept this invitation to provide a Disqualification Undertaking or that you subsequently decide to apply for relief from a Disqualification, the Director, the liquidator, the receiver, or any creditor or contributory of the company has the right to introduce in any Court proceedings that might ensue such further or supplementary evidence as is considered appropriate in relation to the circumstances, facts and allegations outlined in Part B2 hereto.
7. A summary of the legal effects for you of giving a Disqualification undertaking is outlined in Part D of this Notice. Given the significant implications for you, **it is strongly recommended that you seek independent legal advice in relation to this matter before you consider signing the Disqualification Acceptance Document.**

Dated this \_\_\_\_ day of \_\_\_\_\_ 20\_\_

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

Position: \_\_\_\_\_

Phone No: \_\_\_\_\_

Email: \_\_\_\_\_

## Part B

### ***Particulars of the Circumstances, Facts and Allegations That Have Given Rise to the Belief and Opinion Referred to in Paragraph 1 of Part A.***

#### **B1: Circumstances specified in section 842 of the Companies Act 2014 ("the Act") [delete any that do not apply]**

- a. you have been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors;
- b. that you have been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any breach of your duty as such promoter, officer, auditor, receiver, liquidator or examiner;
- c. that a declaration has been granted under section 610 of the Act in respect of you;
- d. that your conduct as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, makes you unfit to be concerned in the management of a company;
- e. that, as disclosed in a report of inspectors, appointed by the High Court or the Director of Corporate Enforcement under the Act, your conduct makes you unfit to be concerned in the management of a company;
- f. that you have been persistently in default (within the meaning of sections 842(f), 843(1) and 843(2) of the Act) in relation to the relevant requirements (as defined in Section 837 of the Act);
- g. that you have been guilty of 2 or more offences under section 286 of the Act;
- h. that you were a director of a company when a notice was sent to the company under section 727 of the Companies Act 2014 and the company, following the taking of the others steps under Chapter 1 of Part 12 of the Act consequent upon the sending of the notice, was struck off the register under section 733 of the Act;
- i. that—
  - i. you are disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking, and
  - ii. it would have been proper to make a disqualification order against you otherwise under section 842 of the Act if your conduct or the circumstance otherwise affecting you that gave rise to the foreign disqualification had occurred or arisen in the State.



**B2: Facts and Allegations that have given rise to the belief referred to in B1 hereto:**

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In the event that you decide not to accept this invitation to provide a Disqualification Undertaking or that you subsequently decide to apply for relief from a disqualification, the ODCE reserves the right to introduce such further or supplementary evidence as it considers appropriate in relation to the circumstances, facts and allegations outlined above in any Court proceedings that might ensue.

## Part C

### Disqualification Acceptance Document

#### SECTIONS 849 TO 851 OF THE COMPANIES ACT 2014

[1] I, \_\_\_\_\_

Date of Birth: \_\_\_\_\_

Address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

hereby signify, in writing, my voluntary submission to Disqualification, in accordance with Chapter 5 of Part 14 of the Companies Act 2014 for the period of \_\_\_\_\_ beginning on \_\_\_\_\_.

[2] The scope and effect of the Disqualification Undertaking to which, in consequence of this acceptance, I will become subject has been explained to me in Part D of this Notice. In particular, I have noted that, in the event that I act in contravention of the Disqualification undertaking to which I am hereby submitting, I will be at risk of

- (i) being prosecuted for a criminal offence; and/or,
- (ii) becoming the subject of a further disqualification order for a period of ten years or such other period, (shorter or longer), as the court may prescribe; and/or
- (iii) becoming personally liable, without any limitation of liability, for all or part of the debts of a company.

[3] Solely for the purposes of Chapter 5 of Part 14 of the Companies Act 2014, and for any other purposes consequential to the giving of a Disqualification Undertaking (including, in particular, any future application for relief under *section 847* of the Companies Act 2014), I confirm that I do not dispute the underlying facts and circumstances as set out in Part B of this Notice.

[4] I acknowledge that I have been strongly advised, in Part D of this Notice, to obtain independent legal advice before deciding to give a Disqualification undertaking. I confirm that I have duly noted this advice and that I understand the consequences of signing this Undertaking.

**SIGNED** by the said

\_\_\_\_\_

On the [ ] day of [ ] 20[ ]

in the presence of:

\_\_\_\_\_

**Name:**

**Address:**

**Occupation:**

**PRESENT** when the Common Seal  
of the Director of Corporate  
Enforcement was affixed hereto:

## Part D

### Legal Effects of a Disqualification Undertaking

#### Effect of Disqualification

- A. If you give a disqualification undertaking for the disqualification period, the legal effect for you will be that you will be disqualified, during the disqualification period, from being appointed or acting as a director or other officer, receiver, statutory auditor, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of each of the following:
- a private company limited by shares;
  - a designated activity company;
  - a public limited company;
  - a company limited by guarantee;
  - an unlimited company;
  - an unregistered company;
  - any friendly society within the meaning of the Friendly Societies Acts 1896 to 2014;
  - any society registered under the Industrial and Provident Societies Acts 1893 to 2014;
  - an Irish Collective Asset management Vehicle (ICAV).
- B. Following the submission of the undertaking, your name will be entered into the Register of Disqualified Persons maintained by the Registrar of Companies. This will be accessible by the general public for the duration of the period of your Disqualification.

#### Breach of Disqualification Undertaking

- C. If you fail to comply with the terms of your disqualification undertaking you are liable to be prosecuted for a criminal offence under *section 855* of the Act. If convicted of such an offence you are liable to a fine and/or imprisonment and, in addition, the imposition of a further disqualification for a period of ten years or such other period, (shorter or longer), as the court may prescribe. Under *section 859* of the Act it is also possible that you could be held personally liable, without any limitation of liability, for all or part of the debts or other liabilities of any company in relation to which you have acted in a manner or a capacity which you are prohibited from doing by virtue of being subject to a disqualification undertaking.

Any person who acts in accordance with your instructions, during your duration of disqualification, is also liable to be prosecuted for a criminal offence.

#### Other Effects

- D. You will be *deemed*, for the purposes of the Act, to be subject a disqualification order, being an order of the type ordinarily made by the courts under *section 842* of the Act. This may give rise to consequences under a variety of other legislative codes. For example, you would cease to be qualified to hold certain offices (e.g., as a member of the Charities Regulatory Authority or the Competition and Consumer Protection Commission). Similarly the fact that you were or had been deemed subject to disqualification order might have a bearing on whether you could be an attorney under an enduring power of attorney.

### Relief Application

- E. Even where you give a Disqualification Undertaking, *section 847* of the Act permits you to apply to the High Court subsequently seeking to be relieved (whether in whole or in part) from the disqualification. The court may grant such relief only if it considers it just and equitable to do so, and then only on the terms and conditions that the court sees fit. Furthermore, the ODCE reserves the right to oppose any such application. In this regard, you should also note that, as part of your acceptance of a Disqualification Undertaking, you will have accepted that the underlying facts and circumstances outlined in Part B are not disputed.

### No Obligation to give an Undertaking

- F. **There is absolutely no obligation on you to give an undertaking.** However, if you decide that you do not wish to voluntarily submit to a disqualification undertaking, then you should be aware that it is likely that an application will be made to the High Court to have you disqualified. You should be aware that if the Court decides to make a disqualification order against you, it could be for a duration which is longer than the duration indicated in this document.
- G. You should also keep in mind that the courts may direct that the disqualified person shall bear not just the costs of the application to court, but also some, or all, of the costs incurred by the ODCE, the Director of Public Prosecutions, a liquidator, receiver or examiner, in investigating the matter and in collecting evidence in respect of those matters including such portion of the applicant's remuneration and expenses as are attributable to such investigation and collection.
- H. Where you decline to give the undertaking within the deadlines specified and on the terms outlined in this document and an application to have you disqualified is subsequently made under *section 842* of the Act arising from or in connection with the underlying facts and circumstances, it will not be open to you to seek to settle, or discontinue, those legal proceedings by offering an undertaking at some later date. Under Section 851(6) of the Act the ODCE is specifically precluded from offering a disqualification undertaking once a disqualification application has been made to the High Court (including any application, of which the ODCE is aware, brought by anyone else such as a liquidator or a receiver).

### Recommendation to obtain independent Legal Advice

- I. The foregoing is simply an outline of the key legal effects, under Irish statute law, for a person who has given a Disqualification undertaking. In particular cases, the giving of such an undertaking might also have consequences in private law, for example, under a contract of employment or in a contract relating to the lending of money. It is not possible, in a document of this sort, for every conceivable legal effect to be stated comprehensively, in a manner which is appropriately tailored to the particular circumstances of particular persons.
- J. **Accordingly it is strongly recommended that you should seek independent legal advice before deciding to give a Disqualification undertaking.**