



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

Information Notice I/2009/4

REPORTING COMPANY LAW OFFENCES Information for auditors

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REPORTING COMPANY LAW OFFENCES

Information for auditors

This paper has been developed jointly by the Office of the Director of Corporate Enforcement (ODCE) and the professional accountancy bodies to assist auditors in applying the judgments required to determine whether a duty to report to the Director of Corporate Enforcement (the Director) arises under section 194(5) of the Companies Act 1990 (the 1990 Act) and to highlight certain areas of company law in which, should a reportable offence occur, relevant information may come to the auditors' attention in the course of normal audit procedures.

Primary guidance for auditors in this area is Auditing Practices Board (APB) Bulletin 2007/2 "The Duty of Auditors in the Republic of Ireland to Report to the Director of Corporate Enforcement" (APB Bulletin 2007/2) and International Standards on Auditing (UK and Ireland) issued by the APB and applicable in the UK and Ireland (ISAs (UK and Ireland)), particularly ISA (UK and Ireland) 250 (A) "Consideration of laws and regulations in an audit of financial statements" and ISA (UK and Ireland) 250 (B) "The auditor's right and duty to report to regulators in the financial sector". This paper presumes knowledge of those documents.

This paper deals with the Companies Acts up to and including the Companies (Amendment) Act 2009.

Introduction

1. Section 194(5) of the 1990 Act, as amended¹, states:

"where, in the course of, and by virtue of, their carrying out an audit of the accounts of the company, information comes into the possession of the auditors of a company that leads them to form the opinion that there are reasonable grounds for believing that the company or an officer or an agent of it has committed an indictable offence under the Companies Acts (other than an indictable offence under section 125(2) or 127(2) of the Principal Act) the auditors shall, forthwith after having formed it, notify that opinion to the Director and provide the Director with details of the grounds on which they have formed that opinion".

2. Section 194(6) of the 1990 Act protects auditors from liability for breach of confidentiality or any other legal or professional duty when they comply with section 194 of that Act. Auditors are reminded that such protection may not exist in the event of a report being made outside of the scope of section 194. Auditors therefore ensure that a clear decision making process is followed in the formation of an opinion that gives rise to a report to the ODCE. Part 1 of this paper outlines the decision process involved in determining whether a duty to report arises.

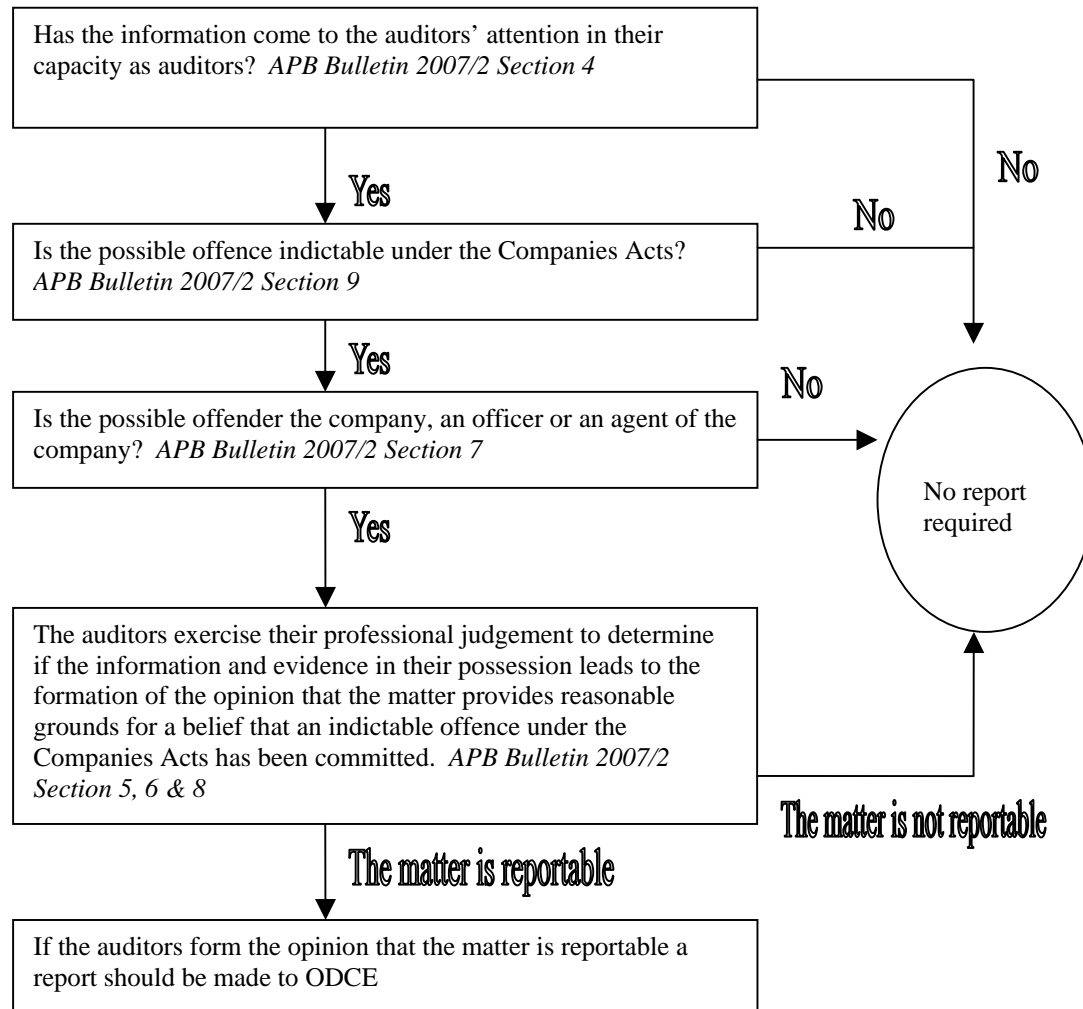
¹ Section 194 of the Companies Act 1990 has been amended by section 74 of the Company Law Enforcement Act, 2001, Section 37 of the Companies (Auditing and Accounting) Act 2003, and section 73 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.

3. The ODCE reports² that 87% of all reports from auditors received by them in 2008 related to suspected infringements of the directors' transactions provisions of Part III of the 1990 Act and suspected failure to keep proper books of account in accordance with section 202 of that Act. This outturn has been consistent for a number of years.
4. The ODCE has compiled a list of the indictable offences it considers most likely to come to the attention of auditors in the course of their audit work. Part 2 of this paper sets out that list and, in the case of each offence listed, also attempts to highlight information which may come to the attention of statutory auditors, in the normal course of their audit, causing them to undertake a decision process which may result in a report to the ODCE. The list of offences provided in Part 2 is not intended to exclude other offences should relevant information come to the auditors' attention. The full list of Companies Acts indictable offences is available on the ODCE website, at http://www.odce.ie/en/company_offences.aspx
5. Scenarios described in this paper are intended to highlight the decision making process which auditors go through in determining whether a duty to report under section 194 of the 1990 Act arises. They are in no way intended to provide a black and white guide as to what falls to be reported and what does not. No such formula is possible. Each instance of information which may suggest a possible indictable offence must be considered in the context of the specific circumstances of the company and related events before concluding whether or not to report to the ODCE. The following are examples of some issues which fall within the ambit of the audit and which may also be considered by auditors in the context of reporting to the ODCE:
 - questions in relation to completeness of books and records;
 - impact of tax irregularities;
 - transactions between a company and its directors; and
 - transactions between a company and persons/companies connected with its directors.

² Annual Report 2008 of the Office of the Director of Corporate Enforcement.

Part 1: the auditors' decision process

6. The steps involved in the auditors' determination of whether a duty to report under section 194 of the 1990 Act arises may be described as follows:



Has the information come to the auditors' attention in their capacity as auditors?

7. Auditors are only obliged to report a Companies Acts indictable offence which comes to their attention "*in the course of, and by virtue of,.... carrying out an audit of the accounts of the company*". Therefore, the reporting obligation does not apply to persons/firms providing non-audit services. However, where a person/firm performs, or has performed, non-audit work for a company for whom that person/firm also acts, or subsequently accepts appointment, as auditor, that auditor, acting as such, has certain responsibilities in relation to any information suggesting the commission of an indictable offence which came to attention during the course of the non-audit work. For a full discussion of the issues in this area refer to APB Bulletin 2007/2 section 4.

Is the possible offence indictable under the Companies Acts?

8. Auditors are reminded that the reporting obligation under section 194 relates only to indictable offences under the Companies Acts. Consequently, there is no obligation to report to the ODCE where the auditors become aware of a breach of other legislation such as the Taxes Acts. However, it is possible that a breach of companies legislation might arise from events giving rise to a breach of other legislation.

Is the possible offender the company, an officer or an agent of the company?

9. For the possible indictable offence to be reportable in accordance with section 194 of the 1990 Act the offence must have been committed by the client company, its officers or its agent. Auditors should refer to section 7 of APB Bulletin 2007/2 for more information in this regard.

The auditors exercise their professional judgement to determine if the information and evidence in their possession leads to the formation of the opinion that the matter provides reasonable grounds for a belief that an indictable offence has been committed.

10. As set out in APB Bulletin 2007/2 (paragraph 5.1), the reporting obligation in section 194 of the 1990 Act does not require auditors to seek out possible indictable offences as part of the audit process. However, auditors react to information coming into their possession which suggests that a possible indictable offence has occurred and make any necessary enquiries to enable them to form a considered opinion on the matter. Where auditors detect the suspected commission of an indictable offence under the Companies Acts, they are required by professional standards to carry out such further investigations into the matter as to provide them with an understanding of the nature of the act and to allow them to evaluate the possible effects on the financial statements. Depending on the offence and the circumstances, a conviction on indictment of a company or its officers could potentially impact materially on the company's financial statements reflecting fines, penalties and possibly the consequences of disqualification of directors or resulting claims on the company.
11. Auditors consider the information in their possession as a result of their audit and determine if they have formed an opinion that they have reasonable grounds for believing that a reportable indictable offence has been committed.
12. On occasion auditors will come across information which would not normally be requested in the course of an audit and which leads them to consider a section 194 report. For example the statutory auditors are not obliged to inspect the register of directors' and secretary's interests but may be informed of a lack of completeness in that information by a client staff member and therefore be prompted to consider whether a report under section 194 should be made in relation to a breach of section 53 of the 1990 Act.

If the auditors form the opinion that the matter is reportable a report should be made to ODCE.

13. For details in relation to the timing and content of a report to the ODCE auditors should refer to APB Bulletin 2007/2 sections 10 and 11.

Qualified auditors' reports on financial statements

14. A qualified or modified auditors' opinion on financial statements does not indicate that a report is required in accordance with section 194 of the 1990 Act, nor does a report to the ODCE in the course of an audit result in a qualification in the auditors' opinion on the financial statements. It is possible however, that matters giving rise to a qualification of an auditors' opinion on financial statements may also be the subject of a report to the ODCE. For example if matters arising in the course of an audit give rise to the expression of an opinion in the auditors' report on financial statements that proper books of account have not been kept then the same matters will require a report to the ODCE in relation to a breach of section 202 of the 1990 Act.

Implications for other reporting obligations

15. In considering issues which may require a report under section 194 of the 1990 Act auditors are reminded of the many "whistleblowing" requirements placed upon them by several other pieces of legislation. Depending on the circumstances of the case there may be reporting obligations under section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, section 57 of the Criminal Justice Act, 1994 as amended (money laundering suspicions), section 1079 of the Taxes Consolidation Act, 1997 or in the case of a regulated entity a report may be required to a regulator such as the Financial Regulator. These reporting obligations have differing thresholds of evidence and proof prior to the reporting obligation being triggered. At times these "whistleblowing" obligations are inconsistent with each other requiring caution on behalf of the auditors.

Example of the decision-making process

Scenario: During an audit the auditors are informed that the company has recently settled with the Revenue Commissioners in relation to unpaid taxes. This information draws the auditors' attention to the possibility of a matter requiring a report in accordance with section 194 of the 1990 Act. The auditors go through the decision process to arrive at an opinion as to whether or not they are obliged to make a report.

1. Has the information come to the auditors' attention in their capacity as auditors?

In the scenario described, the information came to the auditors' attention in the course of their audit work.

2. Is the possible offence indictable under the Companies Acts?

The possible breach of tax legislation which may have occurred prior to the settlement is clearly not indictable under the Companies Acts or reportable under section 194 of the 1990 Act. However the auditors consider whether there are possible related breaches of companies legislation such as section 202 of the 1990 Act, which requires the keeping of proper books of account, or section 197 of the 1990 Act in relation to false statements to auditors.

3. Is the possible offender the company, an officer or an agent of the company?

In the scenario described, the auditors decide that any offence related to the settlement is likely to have been committed by the client company or its officers or agents.

4. Formation of opinion

The auditors make enquiries of management and review available records and correspondence to understand the nature of the tax issue giving rise to the settlement and to allow them to properly evaluate the possible effects on the financial statements. The auditors may find evidence that the settlement related to amounts not fairly recorded by the company in which case they may have reasonable grounds to believe that a breach of section 202 of the 1990 Act has been committed. It is possible that the auditors may find evidence that materially false or misleading information was provided to them in prior years giving rise to reasonable grounds to believe that a breach of section 197 (1) has been committed. Alternatively, it may be that the Revenue settlement followed adjudication on a matter of tax law interpretation relating to amounts which were reflected properly in the books and records of the company. Based on information and evidence gathered, the auditors exercise their professional judgement to arrive at an opinion as to whether or not the matter is reportable. If the auditors form the opinion that the matter is reportable a report should be made to ODCE.

Part 2: Examples of offences where relevant information may be identified in the course of a financial statements audit.

This part of the paper sets out some likely indictable Companies Acts offences which, should they exist, might come to the auditors' attention in the course of audit work. It is not intended to exclude other indictable offences should relevant information come to the auditors' attention. Auditors are reminded that the full list of indictable offences is available to read at http://www.odce.ie/en/company_offences.aspx.

The summary of offences set out below is not a substitute for referring to actual legislation and the commentary cannot be construed as a legal interpretation of the relevant provisions. In particular circumstances auditors may consider obtaining legal advice in relation to their obligations under section 194 of the 1990 Act.

Auditors are reminded that the circumstances of a possible Companies Act indictable offence might also give rise to other breaches of company legislation which may impact on the financial statements and which, if indictable, may also be subject to a report under section 194 of the 1990 Act.

The indictable offences set out below are in order of appearance in the Companies Acts and not in any order of perceived importance or likelihood of occurrence.

1. Section 60(15) Companies Act 1963³ - Giving of financial assistance by a company for the purchase of its own shares

In general, companies are prohibited from giving financial assistance, by means of a loan, guarantee, the provision of security, or otherwise, for the purpose of, or in connection with, the subscription of shares in a company, or where the company is a subsidiary company, its holding company.

There are certain exemptions however:

- if the members have passed a special resolution within the previous 12 months allowing for such assistance (the directors are also required to make a statutory declaration that such assistance will not affect the company's ability to pay its debts as they fall due);
- if the financial assistance is part of a scheme for the benefit of employees or former employees;
- if the loan is to persons, other than directors, such as bone fide employees of the company or a subsidiary enabling them to purchase fully paid shares to be held by the employees as beneficial owners;
- Public limited companies are allowed to give financial assistance to any person under the preceding two bullets only on the basis that the financial

³ Section 60 Companies Act 1963 has been amended by First Schedule of the Companies (Amendment) Act 1983, section 89 of the Company Law Enforcement Act 2001, section 57 of the Companies (Auditing and Accounting) Act 2003, sections 31 and 56 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and by SI 116 of 2005

assistance is given out of distributable profits and the company's net assets are not reduced.

If a company acts in contravention of this section every officer of the company who is in default shall be guilty of an indictable offence.

Commentary

Financial assistance can be a complex area and is only permitted in very particular circumstances including, in the case of a private company, where the directors make a statutory declaration of solvency. There is no requirement for the company's auditors to report on the declaration.

In the course of an audit of financial statements, the auditor assesses the risk of material misstatement in amounts due from third parties and in doing so may examine the terms of a loan in order to determine whether interest and repayments are appropriately recorded. Such details may indicate that monies have been provided by a company for the purpose of purchasing the company's shares.

Financial assistance may be given by providing security for a shareholder's loan. While there is no obligation to do so, auditors may carry out a search of the company's records at the Companies Registration Office which could reveal a charge over the assets of a company. In circumstances where there is no loan on the company's books corresponding to such a charge on the company's assets it may be that security has been provided by the company to assist a shareholder obtain a loan to purchase company shares.

2. Section 297 Companies Act 1963⁴ - Fraudulent trading

"If any person is knowingly a party to the carrying on of the business of a company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, that person shall be guilty of an offence."

Commentary

This is a serious offence, most likely to arise in the context of a company experiencing financial difficulty, and involves a very specific fraudulent intent. Circumstances meeting the definition of the offence are likely to be infrequent.

Creditors in either context used in the section could, for instance, include the Revenue Commissioners.

Auditors carry out procedures required by ISA 240 (UK & Ireland) "The Auditor's Responsibility to Consider Fraud in an Audit of Financial Statements" to assess the risk of material misstatement from fraud, defined as deliberate misstatements resulting either from fraudulent financial reporting or misappropriation of assets. Auditors are concerned with fraud that causes material misstatement in the financial

⁴ As amended by section 137 of the Companies Act 1990

statements and not with the broader legal definition of fraud or the specific definition of fraudulent trading set out in section 297 of the Companies Act 1963.

In carrying out procedures required by ISA 570 (UK & Ireland) “Going Concern” auditors may become aware of uncertainties that may affect the going concern status of a company. However, whilst auditors may become aware of information indicative of risks that third parties may suffer financial loss, this of itself does not indicate any fraudulent intent.

In the infrequent circumstances requiring consideration of the offence, auditors may wish to take legal advice.

Fraudulent trading involves dishonesty and the intent to defraud the creditors of the company or of another entity or person. Case law demonstrating the types of circumstances in which the criteria of section 297 of the Companies Act 1963 are met is limited. Case law examples of such circumstances include:

- (i) where a person obtained a loan on behalf of a company where he knew that the company was not in a position to discharge the loan; and
- (ii) where a company obtains multiple bank loans over the same property without disclosing the existence of all such loans to the lenders or other interested persons.

3. Section 40 Companies (Amendment) Act 1983 - Not holding an EGM

Section 40 of the Companies (Amendment) Act 1983 requires directors of a company to convene an extraordinary general meeting (EGM) when a company’s net assets are half or less of the company’s called up share capital. The meeting must:

- be convened within 28 days of a director becoming aware of this situation;
- be held within 56 days of that date; and
- be for the purpose of considering whether any, and if so, what measures should be taken to address the situation.

If the directors fail to convene an EGM in accordance with section 40(1) of the Companies (Amendment) Act 1983, each of the directors who “knowingly and wilfully authorises or permits that failure” or who “knowingly and wilfully authorises or permits that failure to continue” is guilty of an indictable offence.

Commentary

Section 193(4C) of the 1990 Act requires that the auditors’ report on financial statements shall include a statement as to whether in the opinion of the auditors there existed at the balance sheet date a financial situation which under section 40(1) of the Companies (Amendment) Act 1983 would require the convening of an EGM of the company. Auditors have no obligation to check that an EGM has taken place. Auditors may, however, be made aware of a failure to hold an EGM particularly where the auditors have made reference in their auditors’ report on prior year financial statements to the existence of a financial situation requiring the holding of an EGM.

4. Section 22(3) Companies (Amendment) Act 1986 – Wilfully providing false information in any return, report, certificate, balance sheet or other document under this Act

If any person knowingly and wilfully makes a statement false in any material particular in any return, report, certificate, balance sheet or other document required by or for the purposes of any provisions of the Companies (Amendment) Act 1986, he is guilty of an indictable offence.

Commentary

Auditors may be prompted to consider whether there is a possible breach of this section when the auditors are appointed to the company for the first time, and during the audit the auditor becomes aware of assets which are to be included in the balance sheet for the current year but were omitted from the balance sheet for the previous year. Auditors are reminded of the requirement for the false statement to be knowingly and wilfully made for an offence to have been committed under this section.

5. Section 40 Companies Act 1990⁵ - Substantial property transactions/loans to directors or connected persons

Section 40 of the 1990 Act sets out the criminal penalties for a breach of section 31 of that Act. Section 31 of the 1990 Act introduced a series of provisions designed to provide protection for creditors by prohibiting, in general, the making of certain arrangements by a company to that company's directors or connected persons or from giving any form of credit, by any means, to a company director or connected persons.

The following transactions between a company and a director or a connected person are not permitted except as provided for by sections 32 to 37 of the 1990 Act;

- making of a loan or a quasi-loan to a director of the company or its holding company or to a person connected with such a director;
- entering into a credit transaction as creditor for such a director or a person so connected;
- entering into a guarantee or providing any security in connection with a loan, quasi-loan or credit transaction made by any other person for such a director or a person so connected;
- arranging for an assignment to it or the assumption by it of any rights, obligations or liabilities under a transaction, which, if the company had entered into it, would have contravened this section;
- A company shall not take part in any arrangement whereby:-
 - (i) another person enters into a transaction which, if it had been entered into by the company, would have contravened this section;
 - (ii) that other person, in pursuance of the arrangement, has obtained or is to obtain any benefit from the company or its holding company or a subsidiary of the company or its holding company.

⁵ As amended by section 7 of the Companies (Amendment) Act 2009

The criminal penalties for breach of Section 31 are set out in Section 40 of the 1990 Act as follows:

- If a company enters into a transaction or arrangement that contravenes section 31, every officer of the company who is in default shall be guilty of an offence.

In addition there are significant disclosure obligations for all companies (and special disclosure obligations for licensed banks) under sections 41⁶, 42, 43⁷ and 44⁸ of the 1990 Act. Breaches of these disclosure requirements are also offences.

The offences in question are indictable.

Commentary

The area of directors' loans and credit transactions is complex. A more detailed booklet entitled "A Guide to Transactions Involving Directors" is available from the ODCE.

The scope of the statutory audit work involves a review of disclosures in the financial statements concerning substantial property transactions/loans with directors. Additionally, section 192(3) of the Companies Act 1963 and section 46 of the 1990 Act place an obligation on auditors to include a statement in the auditors' report of required disclosures concerning directors' loans and transactions, should these not be included in the financial statements.

The auditor may be prompted to consider whether there is a possible breach of section 40 when transactions/loans with directors of the company are significant in relation to assets of the company. Auditors are reminded that the "10%" test in section 32 of the 1990 Act is a total test applied to all relevant transactions with directors and not to each individual transaction. The auditor may also be prompted to consider whether there are possible breaches of Sections 41, 42 and/or 43 (and/or in the case of licensed banks Section 44) of the 1990 Act where disclosures made in the financial statements do not comply with the provisions of those sections.

6. Section 53 Companies Act 1990 – directors' and secretary's notification of interest in the company

A director or secretary of a company must notify the company in writing of all interests or changes in interests in shares or debentures of the company, its holding company or any subsidiary company of the company or its holding company. Failure to notify as required is an indictable offence.

Commentary

⁶ As amended by SI 116 of 2005 and section 8 of the Companies (Amendment) Act 2009

⁷ As amended by SI 116 of 2005 and section 8 of the Companies (Amendment) Act 2009

⁸ As amended by section 9 of the Companies (Amendment) Act 2009

Auditors will not normally seek to inspect notifications of directors' and secretary's interests in shares and debentures of the company as part of their audit work. However, in the normal course of audit work, auditors may become aware of a conflict between the company secretary's understanding of a director's interests and a director's own understanding of his interests suggesting that the company secretary may not have been properly notified.

7. Section 197(1), (3) Companies Act 1990 - False statements to auditors, delay in providing information

It is an indictable offence for an officer of a company, which for the purposes of this section includes an employee, to knowingly or recklessly make a statement that is misleading, false or deceptive in a material way to an auditor of a company. This applies to statements which convey, or purport to convey, any information or explanation which auditors require under the Companies Acts or are entitled to require as company auditors.

It is also an indictable offence for an officer of a company, which includes an employee, to fail to provide the auditor of the company, within two days of the auditor's request, with any information or explanation that is within the knowledge of or can be procured by the officer.

Commentary

Auditors may be prompted to consider whether there is a possible breach of this section where information comes to their attention which reveals false invoices, suppression of sales or other false accounting. Such information may come to the auditors' attention when they become aware of a Revenue settlement, settlement of a legal claim against the company or otherwise as a result of normal audit work. Auditors are aware that the false statement must be made knowingly or recklessly by the officer for there to be an offence under section 197 of the 1990 Act.

8. Section 202⁹ Companies Act 1990 - Failure to keep proper books

Every company is required to keep proper books of account in the form of documents or otherwise. The overriding requirement in respect of the books of account is that they must enable accounts giving a "true and fair view" to be prepared and must properly explain the company's transactions. Proper books must specifically:

- (a) correctly record and explain the transactions of the company;
- (b) enable the financial position of the company to be determined with reasonable accuracy at any time;
- (c) enable the directors to ensure that the financial statements of the company comply with the requirements of the Companies Acts;
- (d) enable the annual accounts of the company to be readily and properly audited;
- (e) be kept on a continuous and consistent basis.

⁹ As amended by SI 116 of 2005

Contents of the books of account:

- (a) entries from day to day of all sums of money received and expended;
- (b) a record of the assets and liabilities of the company;
- (c) if the company's business involves dealing in goods:
 - a record of all goods purchased and sold with sufficient detail to enable the identification of both buyers and sellers (except those sold for cash in retail trade) and a record of all related invoices;
 - a statement of stock held at each year end by the company and records of stocktaking from which any such statement of stock is prepared;
- (d) if the company's business involves the provision of services, a record of the services provided and invoices.

Location of the books of account:

- The books of account should be kept at the registered office of the company or at such other place as the director's think fit.
- If the books of account are kept at a place outside the State, details of the accounts and returns must be sent to a place within the State at least every 6 months, to enable the financial position of the company to be determined.

Timeframe for keeping books of account: The company should retain the books of account for a period of at least 6 years.

Section 202(10) provides that both the company and any director who fails to take all reasonable steps to secure compliance with the requirements relating to proper books of account, or who has by his own wilful act been the cause of any such default by the company, shall be guilty of an indictable offence.

In any proceedings, it is a defence for the accused to prove that he had reasonable grounds for believing, and did believe, that a competent and reliable person was charged with the duty of ensuring that those requirements were complied with and the person was in a position to discharge that duty.

Commentary

The auditors' report on the financial statements of a company includes an opinion on whether proper books of account have been kept. Auditors may be prompted to consider whether there is a suspected breach of this section where;

- Information comes to light which suggests that accounting records may not capture all information in relation to a transaction/transactions of the company or in relation to its assets or liabilities;
- A company fails to provide evidence to support material transactions or balances.

An example of failure to keep proper books of account includes failure to maintain stock sheets when a year end stock-take has been conducted. Auditors would also consider whether there has been a breach of section 202 of the 1990 Act where a client has made a Revenue settlement indicating that certain sales were not included in the books of account or the financial statements of the company.

Auditors are reminded that, when they form an opinion that proper books of account are not being kept by a company, section 194 of the 1990 Act requires them to serve, by recorded delivery, a notice on the company stating that opinion. Within seven days of that notice to the company the opinion should be notified to the Registrar of Companies in the prescribed form (Form H4), unless in their opinion the directors of the company have by then taken the necessary steps to ensure that proper books of account are kept.

9. Section 242(1), (1A)¹⁰ Companies Act 1990 - Furnishing false information under the Acts, including to electronic filing agent

A person who, in purported compliance with the Companies Acts, furnishes false information in answer to questions or in providing explanations or who, makes or lodges any return, report, certificate, balance sheet or other document false in a material particular, knowing it to be false or recklessly does so, shall be guilty of an indictable offence.

Commentary

This offence encompasses a broad range of acts or omissions. While auditors may inspect company returns lodged with the Registrar of Companies or other filing agent there is no obligation for them to do so in the normal course of their audit. If information available to auditors appears to contradict formal statements made or documents lodged by the company or its officers and where auditors become aware of those statements or documents in the course of their audit, they may suspect an offence under this section. Auditors are reminded of the requirement for the false statement to be knowingly or recklessly made for an offence to have been committed under this section.

The example of an offence under section 22(3) of the Companies (Amendment) Act 1986 given at point 4 above would also constitute an offence under this section. Auditors are reminded that the circumstances of a possible offence under a particular section of company law may indicate possible breaches of other sections of company law also.

10. Section 243(1) Companies Act 1990 - Destruction, mutilation, falsification of documents

An officer of a company who destroys, mutilates or falsifies, or is privy to the destruction, mutilation or falsification of any book or document affecting or relating to the property or affairs of the body, or makes or is privy to the making of a false entry therein, shall, unless he proves that he had no intention to defeat the law, be guilty of an indictable offence.

Commentary

¹⁰ As amended by section 71 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005

Circumstances where auditors may be prompted to consider whether there is a possible breach of this section include;

- documents appear to provide inconsistent information in relation to material transactions or balances;
- documents expected to be available in support of material transactions or balances are unavailable; or
- audit work reveals “ghost” customers or employees.

11. Section 33(6) Companies (Amendment) (No. 2) Act 1999 - Omission from balance sheet of directors’ statement claiming audit exemption

If a company avails itself of audit exemption in a financial year, the balance sheet in respect of that year must contain a statement by the directors of the company, positioned above the signatures of the directors, that:

- (a) the company is availing itself of audit exemption;
- (b) the exemption is being availed of on the grounds that it satisfies the conditions set out in section 32 of the Companies (Amendment) (No. 2) Act 1999;
- (c) no notice has been served, in the requisite time-frame, on the company from any member or members of a company holding shares in the company that confer, in aggregate, not less than one-tenth of the total voting rights in the company stating that that member or those members do not wish the exemption to be availed of; and
- (d) the directors acknowledge their obligations under the Companies Acts to keep proper books of account which give a true and fair view of the affairs of the company at the end of its financial year and of its profit or loss for that year and otherwise to comply with the provisions of the Companies Acts in relation to accounts.

It is an indictable offence not to provide such a statement on the balance sheet.

Commentary

Since Part III of the Companies (Amendment) (No. 2) Act 1999 relates to exemption from statutory audit it will not be common for auditors to identify a breach of Section 33(6) of that Act. However, auditors may become aware of an offence under this section in circumstances where they are undertaking an audit of financial statements in respect of a year following a year in which audit exemption was availed of by a company. For example, a review of the financial statements filed in respect of the preceding year may reveal an absence of the statement required under section 33(4) of the Companies (Amendment) (No. 2) Act 1999.

12. Section 37(1) Companies (Amendment) (No. 2) Act 1999 - Wilfully false statements in accounts and returns

If any person in any return, statement, balance sheet or other document required by or for the purposes of any provision of Part III of the Companies (Amendment) (No. 2) Act 1999, relating to claims for audit exemption on behalf of a company, wilfully

makes a statement, false in any material particular, knowing it to be so false, he or she shall be guilty of an indictable offence.

Commentary

Since Part III of the Companies (Amendment) (No. 2) Act 1999 relates to exemption from statutory audit it will not be common for an auditor to identify a breach of Section 37(1) of that Act. However, auditors may become aware of an offence under this section in circumstances where they are undertaking a statutory audit of financial statements in respect of a year following a year in which audit exemption was availed of by a company. For example audit work may reveal that the conditions for claiming audit exemption were not properly met in the preceding year despite a directors' statement to the contrary. Auditors are reminded of the requirement for the false statement to be knowingly and wilfully made for an offence to have been committed under this section.

13. Section 43(13)¹¹ Companies (Amendment) (No. 2) Act 1999 – Company to have a director resident in the European Economic Area.

It is an indictable offence for a company not to have at least one director resident in the European Economic Area unless the company holds:

- a bond, in the prescribed form and of specified value, which provides for the payment of any fines imposed on the company in the event of a breach of the Companies Acts or of particular sections of the Taxes Consolidation Act 1997; or
- a certificate issued by the Registrar of Companies in accordance with section 44¹² of the Companies (Amendment) (No. 2) Act 1999 stating that the company has a real and continuous link with one or more economic activities that are being carried on in the State.

Commentary

There is no obligation on auditors to verify the residency of the directors of a company in the normal course of audit work. Auditors may be put on notice of directors' residency outside of the European Economic Area as a consequence of information gleaned in the course of "know your client" procedures or where during the normal course of audit correspondence auditors notice that directors' addresses are outside the European Economic Area.

¹¹ Section 43 of the Companies (Amendment) (No.2) Act 2009 has been amended by section 54 of the Companies (Auditing and Accounting) Act 2005, section 72 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and section 10 of the Companies (Amendment) Act 2009

¹² As amended by section 10 of the Companies (Amendment) Act 2009