



Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement

ODCE Information Notice I/2009/3

Companies (Amendment) Act 2009

Introduction

Pursuant to its remit of encouraging compliance with company law, the Office of the Director of Corporate Enforcement has prepared this summary of the scope of the Companies (Amendment) Act 2009 (“the 2009 Act”). The 2009 Act has addressed a number of actual or potential shortcomings in the existing Companies Acts which had recently come to attention.

Section 1

Section 1 is a standard definitions provision.

Section 2

Section 2 amends Section 194 of the Companies Act 1963¹ (“the 1963 Act”), which places a duty on company directors to disclose their interest in any contracts or proposed contracts with the company.

The revised Section 194 gives the Director of Corporate Enforcement (“the Director”) a right to inspect and copy the book containing directors’ declarations of their interest in company contracts, and it creates an offence to deny the Director access to the book.

Sections 3 and 4

Sections 3 and 4 amend Section 371A of the 1963 Act² and Section 19 of the Companies Act 1990³ (“the 1990 Act”) respectively.

Section 19 permits the Director to oblige companies, directors and other persons to produce for examination specified books and documents in circumstances which include suspected fraud, illegality or prejudice. The revised Sections 19(3) and (3A) express more clearly the scope of the Director’s power to require third parties to produce relevant records. However, the change is predominantly one of wording rather than one of substance. The pre-existing Section 19(3) was generally understood to give the Director the same powers, but in language which was less unequivocal. Also, Section 4(2) of the 2009 Act clarifies that these amendments are not intended to signify any ineffectiveness as regards the pre-existing

¹ As amended by (i) Section 47(3) of the Companies Act 1990; (ii) Section 104(c) of the Company Law Enforcement Act 2001; and (iii) Section 57 of the Companies (Auditing and Accounting) Act 2003 and Item No. 1 in Schedule 2 of that Act.

² As inserted by Section 97 of the Company Law Enforcement Act 2001.

³ As replaced by Section 29 of the Company Law Enforcement Act 2001 and subsequently amended by Section 67 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

Section 19(3).⁴

Section 371A of the 1963 Act⁵ enables the Director to compel compliance with Section 19(3) by obtaining a High Court Order if necessary. The only revision to Section 371A(1) made by the 2009 Act is that a statutory reference is updated to take account of the above-mentioned changes made in Section 19. Again, this is a technical change, rather than one under which anyone becomes subject to any new burdens or obligations.

Section 5

Section 5 amends Section 20 of the 1990 Act⁶ which empowers an authorised officer of the Director who has succeeded in obtaining a search warrant from a District Court judge to enter and search a specific premises and to seize information constituting a possible breach of the Companies Acts (“material information”) and to take other related actions ancillary to the search.

The revised Section 20 provides that the existing one-month period of validity of the search warrant may, on application by the authorised officer, be extended by the relevant District Court. (The Court’s power to issue a fresh warrant for the same premises is preserved, however). It also confers an extended power to seize, for examination elsewhere, something:

- that is reasonably believed may be or may contain material information where it is not reasonably practicable to make that determination on the premises, or
- that includes both seizable and non-seizable information where it is not reasonably practicable to separate on the premises the seizable information from the thing in which it is comprised.

Specific criteria by which the authorised officer must assess what is “reasonably practicable” are stipulated in the legislation. Also, the authorised officer must address specified matters before deciding to avail of this extended power of seizure. Unless the officer was of the opinion that the integrity of the material information might be compromised, he or she should first put in place reasonable storage, access and security arrangements in consultation with, and if possible with the agreement of, the owner, lawful custodian or possessor of the matters to be seized before exercising this extended power of seizure. In certain circumstances, the officer may make or vary these arrangements in a manner considered appropriate.

As soon as practicable and within three months of the exercise of the extended power of seizure, it will be the officer’s duty to complete:

- the determination of what constitutes material information, and/or
- the separation of the seizable information from the other information with which it is comprised.

⁴ Which was in force between 28 November 2001 and 11 July 2009.

⁵ As inserted by Section 97 of the Company Law Enforcement Act 2001.

⁶ As replaced by Section 30 of the Company Law Enforcement Act 2001 and subsequently amended by Section 68 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

As soon as practicable and within seven days of the determination or separation, it will be the officer's duty to return the information which is not material information to its owner, lawful custodian or possessor.

The Director or an affected person may make an application by motion to the High Court for directions to vary the terms of the extended power of seizure (including the variation of the statutory time limits), and that application may be heard in private if the Court so directs.

The Minister for Enterprise Trade and Employment may also make regulations providing for supplementary, consequential or incidental matters relating to the extended power of seizure.

Section 6

Section 6 amends Section 23(1) of the 1990 Act which prohibits compelling the disclosure of or the taking of legally privileged material as part of a company investigation.

While maintaining that principle, Section 6 modifies the scope of Section 23(1) which now compels suspected legally privileged information to be produced, or allows it to be taken, on a sealed basis pending a determination by the High Court as to whether the information qualifies as privileged legal material. However, a person who takes possession of the information or to whom it is disclosed must apply to the Court within seven days. A person who is compelled to disclose the information or from whom possession of it has been taken may also apply to the Court. Any Court application must be made by motion, and it may be heard in private if the Court so directs.

Pending a final determination as to whether the information is legally privileged material, the Court may give such directions as it considers appropriate, including with respect to:

- the preservation of the information in a safe and secure place;
- the appointment of a suitable independent legal person to examine the information and report to the Court in order to help determine if it is legally privileged material.

Section 7

Section 7 relates to Sections 31 and 40 of the 1990 Act. Section 31 generally prohibits the use of company assets by directors or persons connected with them, and Section 40 provided that it was an offence if a person procured a company, or an officer of a company authorised or permitted the company, to enter into a transaction or arrangement knowing or having reasonable cause to believe that the company was thereby contravening Section 31.

Section 7 amends Section 40 which now simply provides that if a company enters into a transaction or arrangement in breach of Section 31, every officer of the company who is in default is guilty of an offence.

Section 8

Sections 41 to 45 of the 1990 Act deal with the disclosure by companies generally of loans and other transactions made to directors and persons connected to them. Parts of Sections 41

and 43⁷ make special provision for the disclosure of these transactions in the notes to the annual financial statements of licensed banks and their holding companies.

Section 8 amends Section 41, and subject to an exemption for any minor aggregate liability, the revised Section 41 now requires the disclosure of particulars of the principal terms of each transaction for each director of a licensed bank or its holding company, including:

- the amount of principal and interest due at the beginning and end of the financial year;
- the maximum liability during the financial year;
- the amount of any interest, which, having fallen due, has not been paid, and
- the amount of any provision made for failure or anticipated failure to repay all or part of the loan or interest.

Subject to exemptions for any transactions made in the ordinary course of business and on normal commercial terms and for any minor qualifying liability, the revised Section 43 requires the disclosure of the following aggregate data for transactions made to or due by persons connected to the directors of licensed banks or their holding companies:

- the aggregate amount due at the end of the financial year;
- the number of beneficiaries at the end of the financial year;
- the aggregate maximum amount due during the financial year and
- the maximum number of beneficiaries during the financial year.

These new requirements do not prejudice the Financial Regulator in exercising its powers to oblige the disclosure of related particulars by licensed banks and their holding companies.

Where a company makes default in complying with Section 41 or 43, the company and every director who is in default is guilty of an offence.

Section 9

Section 9 amends Section 44 of the 1990 Act under which licensed banks and their holding companies must maintain a register of directors' transactions for the current financial year and each of the preceding ten years. This register must also include the transactions made to persons connected with the directors for this period unless they were made in the ordinary course of business and on normal commercial terms. The revised Section 44 gives a right to the Director to inspect and copy the register, and make it an offence to deny him access to it.

⁷ As amended in the case of Sections 41 and 43 by Regulation 9 and Items 2 and 3 respectively of Part 4 of Schedule 1 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005.

Under Section 44, licensed banks and their holding companies must also prepare a statement of directors' and connected persons' transactions for the preceding financial year which must be made available for inspection by shareholders at the company's annual general meeting and for at least 15 days prior to the meeting. Transactions made in the ordinary course of business and on normal commercial terms are exempted from this statement, and the revised Section 44 also exempts any transaction particulars of which are now required to be included in the company's financial statements.

Section 10

Section 10 amends Sections 43⁸ and 44 of the Companies (Amendment) (No. 2) Act 1999.

The revised Section 43 now requires that at least one director of every Irish-registered company be resident in a Member State of the European Economic Area subject to certain exemptions. (Section 43 previously required that at least one director be resident in Ireland.)

Under Section 44, a company is exempt from Section 43 if it possesses a certificate from the Registrar of Companies stating that it has a real and continuous link with an economic activity being carried on in the State. The revised Section 44 now outlines a number of conditions, any one of which will be sufficient to satisfy this condition.

Section 11

Section 11 is a standard provision naming the 2009 Act and providing that it and the Companies Acts shall be read as one.

Office of the Director of Corporate Enforcement
31 July 2009

⁸ As amended by Section 54 of the Companies (Auditing and Accounting) Act 2003.