



Office of the Director
of Corporate Enforcement

*Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach*

ODCE Information Notice I/2005/3

**Exemption for Auditors Reporting Annual Return Defaults to the ODCE
(Effective from 1 September 2005)**

Introduction

With effect from 1 September 2005, auditors will no longer be required to notify the ODCE of indictable offences in respect of annual return defaults under Sections 125(2) and 127(12) of the Companies Act 1963.

Background

Section 74 of the Company Law Enforcement Act 2001 amended Section 194 of the Companies Act 1990 with effect from 28 November 2001 by the inclusion *inter alia* of a new subsection (5) providing that—

(5) 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 agent of it has committed an indictable offence under the Companies Acts, 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.

Guidance in relation to the scope and extent of this obligation is contained in the ODCE's Decision Notice D/2002/2 *The Duty of Auditors to Report to the Director of Corporate Enforcement*¹ which was produced in conjunction with the Auditing Practices Board (APB) and the Consultative Committee of Accountancy Bodies – Ireland (CCAB-I).

The 2005 Amendments

On 29 June 2005, President McAleese signed into law the Investment Funds, Companies and Miscellaneous Provisions Act 2005. Section 2 thereof provides that the provisions of the Act shall come into operation on such days as the relevant Minister appoints by order. On 30 June 2005, Mr Micheál Martin T.D., the Minister for Enterprise, Trade and Employment, signed the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Commencement) Order 2005² which provides *inter alia* that Section 73(2)(d) of the 2005 Act shall come into operation on 1 September 2005.

Once Section 73(2)(d) of the 2005 Act comes into operation, Section 194(5) of the Companies Act 1990 will be amended to read—

(5) 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 agent of it has committed an indictable offence under the Companies Acts **(other than an offence under section 125(2) or 127(12) of the Principal Act)**,³ 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.

¹ Available at <http://www.odce.ie/publications/decision.asp>

² S.I. 323 of 2005

³ Emphasis Added.

Effect

The effect of this amendment is that:-

- an auditor, who
- in the course of, and by virtue of, his/her carrying out an audit of the accounts of a company,
- comes into possession of information,
- which leads him/her to form the opinion on or after 1 September 2005
- that there are reasonable grounds for believing that the company or an officer or agent of it has committed an offence under Section 125(2) or 127(12) of the Companies Act 1963,
- need no longer notify the Director of Corporate Enforcement that they have formed such an opinion.

Practitioners should note that:

- these offences remain on the statute book notwithstanding this legal change;
- the only effect of the exemption is to extinguish, commencing 1 September 2005, the requirement to report these offences to the ODCE;
- the obligation on auditors to report to the ODCE all other suspected indictable offences under company law remains unchanged.

Section 125 of the Companies Act 1963⁴

Section 125(1) is the provision under which every company must, once at least in every year, make an annual return in the prescribed form to the Companies Registration Office (CRO).

Section 125(2) provides that where a company fails to do so, offences are committed by—

- the company itself;
- every officer of the company who is in default;⁵
- every shadow director of the company to whose directions or omissions the default is attributable.

Section 127 of the Companies Act 1963⁶

Section 127 contains detailed rules providing *inter alia*—

- for the determination of a company's "annual return date";⁷

⁴ As replaced by Section 59 of the Company Law Enforcement Act 2001.

⁵ Section 383 of the Companies Act 1963 (as inserted by Section 100 of the Company Law Enforcement Act 2001) provides in subsection (1) that "an officer who is in default is any officer who authorises or who, in breach of his duty as such officer, permits, the default .."; subsection (2) provides that "an officer shall be presumed to have permitted a default by the company unless the officer can establish that he took all reasonable steps to prevent it or that, by reason of circumstances beyond his control, was unable to do so"; subsection (3) provides that "it is the duty of each director and secretary of a company to ensure that the requirements of the Companies Acts are complied with by the company".

⁶ As replaced by Section 60 of the Company Law Enforcement Act 2001 and amended by Section 46 of the Companies (Auditing and Accounting) Act 2003.

⁷ See Sections 127(5), 127(6) and 127(8).

- for the basis on which a company may establish a new annual return date;⁸
- that, ordinarily, a company's annual return must be made up to a date that is not later than its annual return date;⁹
- for the timescale within which an annual return must be delivered to the CRO.¹⁰

Section 127(12) provides that where a company fails to comply with these requirements, offences are committed by the same categories of persons as are listed above.

In practice, instances of non-compliance with Section 127 are most likely to occur where (i) an annual return by a company is made up to the wrong date and/or (ii) an annual return by a company is delivered late to the CRO.

Transitional Aspects

This change in the law will not take effect until 1 September 2005. In the interim, auditors must continue to notify the ODCE where, in the relevant circumstances, they “[*come*] into the possession of [information] ... that leads them to form the opinion that there are reasonable grounds for believing that the company or an officer or agent of it has committed an indictable offence under [Section 125(2) or 127(12) of the Companies Act 1963] ..”.

Cases may possibly arise where an auditor will have formed the relevant opinion on or before 31 August 2005 but will not have notified it to the ODCE by 1 September 2005. In those instances, notwithstanding the amendment in Section 73(2)(d) of the 2005 Act, the auditor's obligation to “*forthwith notify that opinion*” must be discharged even though this calls for action on the auditor's part on or after 1 September 2005. This is the combined effect of Sections 21(1) and 21(3) of the Interpretation Act 1937 which (in so far as relevant) provide that—

*“Where ... a portion of [an Act of the Oireachtas] ... ceases by any means or for any reason (other than repeal by a subsequent Act of the Oireachtas) to be in force”*¹¹

such cesser shall not—

*“affect the previous operation of the portion of the statute so [ceasing to be in force]” or “affect any .. obligation, or liability .. accrued, or incurred under the .. portion of [the] statute so [ceasing to be in force].”*¹²

Availability of the Legislation

Copies of the 2005 Act and of the Commencement Order referred to above are available at the legislation section of ODCE's website at www.odce.ie.

⁸ See Sections 127(9), 127(10) and 127(11).

⁹ Except that, the *first* annual return of a company incorporated on or after 17 May 2004, must be made up to its first annual return date – and not any sooner. See Section 127(1).

¹⁰ See Section 127(2), 127(3) and 127(4).

¹¹ Extract from Section 21(3).

¹² Extract from Section 21(1).

Further Changes to Section 194

The Oireachtas has enacted a number of further minor changes to Section 194 which have not yet been commenced pending consultations between the ODCE, APB and CCAB-I on the preparation of supplementary guidance to update the existing Decision Notice D/2002/2. Work on the development of this guidance will commence shortly.

Further Information

If you have any queries on the implementation of this legal change, please contact Kevin Prendergast at (01) 8585844 or Maria Leavy at (01) 8585833.

Office of the Director of Corporate Enforcement
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