

ODCE Information Notice I/2005/2

Investment Funds, Companies and Miscellaneous Provisions Act 2005 (No. 12 of 2005)

Section 1(2) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (“the 2005 Act”) provides that Parts 3 to 6 and the Companies Acts 1963 to 2003 may be cited together as the Companies Acts 1963 to 2005 and shall be construed together as one.

Pursuant to his remit of encouraging compliance with company law, the Director of Corporate Enforcement has produced in this Information Notice a summary of these new legal provisions in company law as follows:

- Part 1: (Preliminary and General) – this contains standard provisions relating to the implementation of the Act;
- Part 3: (Miscellaneous Investment Fund Amendments) – information on the provisions of this Part is in the following **Appendix 1**;
- Part 4: (Market Abuse) - information on the provisions of this Part is in the following **Appendix 2**;
- Part 5: (Public Offers of Securities) - information on the provisions of this Part is in the following **Appendix 3**;
- Part 6: (Miscellaneous Company Law Provisions) - information on the provisions of this Part is in the following **Appendix 4**.

The Financial Regulator is the primary competent authority for Parts 2 (dealing with non-UCITS Common Contractual Funds), 3, 4 and 5 of the new Act. For further information on the Financial Regulator, go to www.financialregulator.ie. The Office of the Director of Corporate Enforcement (ODCE) will remain responsible for investigating suspected insider trading in respect of the new Irish Enterprise Exchange (IEX) on the Irish Stock Exchange for the time being.

Part 6 of the Act is relevant to the functions discharged by the ODCE and the Companies Registration Office (CRO). For further information on these Offices, go to www.odce.ie and www.cro.ie respectively.

Part 7 of the Act introduces various amendments to consumer legislation and is relevant to the Office of the Director of Consumer Affairs (ODCA). For further information on the ODCA, go to www.odca.ie.

Links

The text of the 2005 Act in full can be accessed [here](#)

The text of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Commencement) Order 2005 (S.I. No. 323 of 2005) can be accessed [here](#)

Office of the Director of Corporate Enforcement
August 2005

Part 3 – Miscellaneous Investment Fund Amendments
(Commenced by S.I. No. 323 of 2005 on 30 June 2005)

General

Part 3 provides for amendments to Part XIII of the Companies Act 1990 (“the 1990 Act”) which deals with Investment Companies. The purpose of this Part is to provide for the introduction of cross investment and segregated liability for investment funds.

Section 22 amends Section 252 of the 1990 Act by the addition of definitions required for the purpose of this Part. These include definitions of ‘management company’, ‘sub-fund’ and ‘umbrella fund’.

Cross-Investment for Investment Funds

Section 23 amends Section 254 of the 1990 Act. While it retains the provision that an investment company may not purchase its own shares unless they are fully paid up, it goes on to provide that this will not prevent an acquisition of shares (by subscription or transfer) for the purpose of cross investment (from one sub-fund to another within an umbrella fund) which is provided for in Section 24 of this Act.

Section 24 amends Section 255 of the 1990 Act by the insertion of a new subsection (3) which provides that an umbrella fund may acquire and hold funds in any of its sub-funds for the purpose of transferring the funds to another one of its sub-funds. Essentially this allows for cross investment in investment companies. It should be noted that an umbrella fund may, for this purpose, only acquire by subscription or transfer for consideration and not by purchase. This does not conflict with Section 254(2) which requires that an investment company may not purchase its own shares unless they are fully paid up, and it does not interfere with Section 253(2)(b)(ii) of the 1990 Act which requires an investment company to purchase shares at the request of the investors in the fund.

Segregated Liability for Investment Funds

Section 25 provides for segregated liability for investment funds by the insertion of Sections 256A, B, C, D and E after Section 256 of the 1990 Act.

Section 256A provides a mechanism by which segregated liability will apply to umbrella funds. Subsection (1) provides that any liabilities of a sub-fund will be discharged solely from the assets of that sub-fund. Subsection (2) provides that segregated liability will not apply to umbrella funds which had commenced trading before the commencement of this Act, unless the members of the umbrella resolve that it should (by special resolution). Subsection (3) specifies what is meant by ‘commenced trading’, and subsection (4)(a) specifies the date on which the special resolution takes effect if no application is made to the High Court under section 256C. Subsection 4(b) deals with cases where an application is made to the Court by creditors and instances where such an application is withdrawn or not. Subsection (5) specifies requirements relating to meetings to consider a special resolution to have segregated liability apply to the umbrella fund.

Section 256B deals with the notice to creditors of a special resolution under section 256A. Subsection (1) specifies requirements relating to how notification should be made to creditors in advance of a meeting to consider a special resolution to have segregated liability apply to an umbrella fund. Subsection (2) outlines what is meant by the 'relevant creditor' of a sub-fund for this purpose.

Section 256C provides that creditors may apply to the Court for an order delaying implementation of the special resolution. Subsection (3) provides that any such order should specify the period for which it is to be in force which may last until the creditor ceases to be a creditor of the sub-fund or until the creditor agrees that segregated liability may be applied to the umbrella fund. Subsection (5) gives creditors 28 days within which to make an application to the Court from the time of notification of the meeting to consider a special resolution. Subsection (6) specifies timeframes within which the creditor must notify the umbrella fund and the Central Bank of an application made to the Court and allows the Bank and the umbrella fund to make representations to the Court. Subsection (7) sets out matters which the Court may take into account when considering if it is just and equitable for an umbrella fund to avail of segregated liability and includes such things as terms of agreement between the creditor and the umbrella fund, conduct of the umbrella to the creditor and reasonableness of the creditor opposing the resolution.

Section 256D deals with appeals from Court orders given under section 256C. Subsection (1) allows a creditor who has applied to the Court or the umbrella fund against whom the order was sought to appeal the Court's decision, and subsection (2) sets a timeframe within which the appeal is to be lodged. Subsection (3) requires an umbrella fund to notify the creditor who made the application and the Central Bank, within certain timeframes, if the umbrella fund is appealing the Court's decision and subsection (4) requires a creditor appealing such a decision to notify the umbrella fund and the Bank, again within certain timeframes.

Section 256E sets out the requirements to be complied with by umbrella funds to which section 256A applies, i.e., those availing of segregated liability. Subsection (1) requires a statement to that effect on letterheads used by the umbrella fund and disclosure of that fact in any other dealings with third parties. Subsection (2) sets out implied terms in contracts, agreements or arrangements entered into by an umbrella fund with segregated liability. Subsections (3) and (4) deal with sums recovered in certain instances and how these should be dealt with. Subsection (5) deals with situations where the assets of one sub-fund are used to fulfil liabilities not attributable to that sub-fund and what action should be taken to regularise the situation (e.g., a transfer of assets from the sub-fund to which liability was attributable). Subsection (6) provides that a sub-fund is not a legal person separate from the umbrella, but the umbrella may sue and be sued and sub-funds may be subject to orders of the Court as though they were a separate legal person by virtue of being a sub-fund of the umbrella. Subsection (7) provides that assets of a sub-fund may be used to discharge liabilities of another sub-fund in the umbrella in cases of fraud or misrepresentation and in the application of certain provisions of the Companies Acts as specified. Subsection (8) deals with the winding up of a sub-fund and limits the duties and responsibilities of a liquidator to that sub-fund, and subsection (9) deals with interpretations for the purpose of subsection (8).

Section 26 amends section 257(4) of the 1990 Act which relates to powers of the Central Bank over investment companies. The purpose of this amendment is to extend the Bank's powers to the management companies of investment funds.

Section 27 amends section 260 of the 1990 Act. The purpose of this amendment is to disapply certain provisions of the Companies (Amendment) Act 1983 to investment companies. This arises from the provisions of cross investment for investment companies.

Section 28 provides for the insertion in the 1990 Act of a new Section 260A which permits investment companies, in respect of their individual accounts, to opt to prepare those accounts in accordance with certain alternative bodies of accounting standards. These are standards that accounts of companies or undertakings must comply with that are laid down by the relevant competent authorities of *(i)* the United States of America, *(ii)* Canada, *(iii)* Japan or *(iv)* any other states or territories prescribed by the Minister for Enterprise, Trade and Employment following consultation with the Financial Regulator, the Irish Auditing and Accounting Supervisory Authority (once formally established) and any other persons whom the Minister considers should be consulted. An investment company opting to prepare its accounts in accordance with such alternative accounting standards must fully comply with the relevant standards as if it (the investment company) were registered in the jurisdiction of the standard chosen.

Part 4 – (Market Abuse)

(Substantially commenced by S.I. No. 323 of 2005 on 30 June, 1 July and 6 July 2005)

General

The purpose of Part 4 is to make enabling provisions that require enactment in primary law to ensure the smooth and effective transposition of the EU Market Abuse Directive and three supplementary Commission Directives. The Market Abuse Directive covers insider dealing and market manipulation. Section 29 provides for the definitions used in this Part. These include the definition of the '2003 Market Abuse Directive' and 'Irish market abuse law' which encompass the measures (e.g., regulations) made to transpose the Directive and supplementary Directives into Irish law.

Section 30 gives the Minister the power to make regulations implementing the Market Abuse Directive, the Market Abuse Regulation and the supplementary Directives.

Section 31 repeals Part V of the Companies Act 1990 to include the Companies (Amendment) Act 1999 relating to Insider Dealing and Stabilisation Rules respectively.

Section 32 outlines penalties on conviction on indictment of certain offences relating to market abuse. It provides for a maximum fine of €10 million and/or a maximum ten years in prison for a conviction on indictment. Summary offences will be dealt with in the transposing regulations.

Section 33 provides for civil liability for breaches of Irish market abuse law. Subsection (1) deals with breaches concerning the insider dealing provisions of the Directive. It provides that a person contravening those provisions will be liable to pay compensation to a party involved in the transaction who was not in possession of the relevant information for loss suffered as a result. Typically, this would be a difference in share price had the information been generally available. The guilty person must also account to the company issuing the shares for any profit made from the transaction. Subsection (2) deals with breaches concerning market manipulation and provides that a person contravening those provisions will be liable to compensate parties dealing in shares as a result of the breach. The guilty person must also account to the company issuing the shares for any profit made from the transaction. Subsection (3) ensures that the provisions in subsections (1) and (2) shall not be affected by any other cause of action against the guilty person. Subsection (4) gives two years from the date of contravention for an action to be taken.

Section 34 gives the Financial Regulator (the competent authority) the power to make supplementary rules to allow them to fulfill their role as the competent authority. These rules must be consistent with Irish market abuse law. It is noteworthy that a breach of these rules can lead to the imposition of administrative sanctions. The Financial Regulator may also issue guidelines relating to the steps to be taken to comply with Irish market abuse law, and it has the power to determine whether a financial interest is significant.

Section 35 provides for an amendment to section 33AJ of the Central Bank Act 1942 which extends the legislative immunity of the Bank and its agents to cover not only their duties under the Central Bank Acts but also their duties relating to other enactments such as the regulations transposing the Market Abuse Directive.

Section 36 provides for an amendment to the Central Bank Act 1942 to include the Market Abuse Directive (and related Directives) and the Prospectus Directive in the list of Directives for which the Central Bank has responsibility to enforce. This deals with confidentiality of information obtained by the Financial Regulator and prohibits its disclosure except in accordance with those provisions.

Section 37 allows the Minister to prescribe by provisional order any market to which market abuse law shall apply. It is important that requirements under the Market Abuse Directive should be capable of being applied to any such new market. Any such provisional order made by the Minister has to be confirmed by an Act of the Oireachtas.

Links

Text of the Market Abuse Regulation

Commission Regulation (EC) No 2273/2003 of 22 December 2003 can be accessed [here](#)

Text of the Market Abuse Directive

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 can be accessed [here](#)

Text of the Market Abuse Regulations giving effect to the EC Directive

S.I. No. 342 of 2005 can be accessed [here](#)

Text of each supplementary directive

Commission Directive 2003/124/EC of 22 December 2003 can be accessed [here](#)

Commission Directive 2003/125/EC of 22 December 2003 can be accessed [here](#)

Commission Directive 2004/72/EC of 29 April 2004 can be accessed [here](#)

Text of the Financial Regulator's Information Note can be accessed [here](#)

Part 5 – (Public Offers of Securities)

(Commenced by S.I. No. 323 of 2005 on 30 June and 1 July 2005)

General

Part 5 amends the Companies Act 1963 (“the 1963 Act”) dealing with offers of securities to the public in anticipation of the transposition of the EU Directive dealing with published prospectuses when securities are listed or offered to the public.

Section 38 provides for definitions used in this Part. These include the definition of the ‘2003 Prospectus Directive’ and ‘Irish prospectus law’ which encompasses measures (e.g., regulations) made to transpose the Directive and the EU Prospectus Regulation which has direct application. It also includes a definition of ‘local offer’ to deal with documents issued for certain transactions not regulated by the Directive. These will be required to contain a clear warning that such offers are not prepared pursuant to the Prospectus Directive and have not been reviewed prior to issue by any regulatory authority. A number of other definitions are included in order to clarify terms used in this Part.

Section 39 deals with the construction of certain terms in the 1963 Act in cases where provisions have been amended or inserted by this Part. It provides that any such insertions or amendments by this Part shall have the same meaning as provided by this Part.

Section 40 provides for necessary repeals and revocations which are being made in anticipation of the transposition of the Prospectus Directive.

Section 41 deals with civil liability for misstatements in a prospectus and provides that certain persons will be liable to pay compensation to persons who acquired securities on the faith of the prospectus for the loss or damage they may have sustained because of untrue statements or omissions in the prospectus. Persons liable include inter alia the issuer of the prospectus, the offeror of the securities, the guarantor of the issue of the securities, directors of the issuer, the promoter of the issuer and those who authorised the issue of the prospectus.

Section 42 provides for exceptions and exemptions applying to Section 38. Liability shall not attach to the summary of a prospectus issued. Directors will not be liable if they had not given their consent or had withdrawn consent to the issue of the prospectus. A person may not be liable if he or she had reasonable grounds to believe the statement to be true or the omission to be properly omitted. Likewise if a statement by an expert was included and the person liable had reasonable grounds to believe the expert was competent and had consented to the inclusion of the statement, he or she may not be liable. Experts will not be liable as a person who authorised the issue of a prospectus purely on the basis that they consented to the issue of a prospectus although they will be liable for untrue statements made by them. In this latter scenario, experts may not be liable if they had withdrawn consent to the inclusion of their statement in the prospectus before publication or if they had withdrawn their consent after publication and made their reasons publicly known to

those acquiring securities. Experts may also not be liable if they had reasonable grounds to believe that the statement was true.

Section 43 provides for a restriction of liability in cases where certain non-equity securities are involved.

Section 44 provides for the indemnification of certain persons in cases where, for instance, a director has withdrawn his or her consent, has not consented to become a director or has not consented to the issue of a prospectus. Similarly, indemnification will apply to an expert who has withdrawn his or her consent or has not given his or her consent to the issue of a prospectus. The directors of the issuer shall be liable to such directors and experts in such circumstances.

Section 45 provides that an expert must give his or her consent to the inclusion of statements made by him or her in a prospectus.

Section 46 gives the Minister the power to make regulations implementing the Prospectus Directive and the Prospectus Regulation.

Section 47 provides for penalties on conviction on indictment for offences under Irish prospectus law. This would cover a situation where securities are offered to the public or listed without issuing a prospectus.

Section 48 provides for criminal liability for untrue statements and material omissions in a prospectus.

Section 49 deals with local offers. It sets out requirements for offering documents prepared for local offers and specifies statements which must be included in various places in those documents. As defined in Section 38, local offers are those where the total consideration for the offer is less than €2,500,000 but does not apply to offers exempted or excluded from the Directive.

Section 50 provides that a document prepared in accordance with EU prospectus law or an offering document does not constitute an investment advertisement within the meaning of the Investment Intermediaries Act 1995.

Section 51 gives the Financial Regulator (the competent authority) the power to make supplementary rules to allow them to fulfill their role as competent authority. These rules must be consistent with Irish prospectus law. The Financial Regulator may also issue guidelines around the steps to be taken to comply with Irish prospectus law and has the power to determine whether a financial interest is significant.

Section 52 is a restatement of section 44(2) of the 1963 Act as amended to encompass EU prospectus requirements. Essentially, it makes void any condition requiring an applicant to waive compliance with this Part or EU prospectus law.

Section 53 amends section 53 of the 1963 Act and removes the reference to Third Schedule which is repealed in Section 40.

Section 54 amends section 55 of the 1963 Act and is consequent on the repeal of section 54 under Section 40.

Section 55 amends section 57 of the 1963 Act and simply substitutes words in order to reflect new terminology being used in the Directive.

Links

Text of the Prospectus Regulation

Commission Regulation (EC) No 809/2004 of 29 April 2004 can be accessed [here](#)

Text of the Prospectus Directive

Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 can be accessed [here](#)

Text of the Prospectus Regulations giving effect to the EC Directive
S.I. No. 324 of 2005 can be accessed [here](#)

Text of the Financial Regulator's Information Note can be accessed [here](#)

Part 6 – (Miscellaneous Company Law Provisions)

(Partially commenced by S.I. No. 323 of 2005 on 30 June and 1 September 2005)

General

This Part deals with miscellaneous amendments to the Companies Acts 1963 to 2003. Section 56 amends section 60 of the 1963 Act by enumerating a number of specific circumstances which are not to be regarded as coming within the scope of the prohibition in section 60(1) on the giving by a company of any financial assistance for the purchase of its shares. A number of these amendments implement recommendations of the Company Law Review Group (CLRG) in their First Report. Sections 57 provides for electronic filing agents. This was recommended by the CLRG in their First Report. It allows companies to appoint electronic filing agents to file documents with the Companies Registration Office (CRO) in electronic form. Advance notice must be given to the CRO of such an appointment.

Section 58 provides that a company may revoke an authorisation appointing a person to act as an electronic filing agent and that this takes effect once notified to the CRO.

Sections 59 and 60 provide for the reservation of a company name with the CRO. An application may be made to the Registrar to reserve a company name and a fee must be paid. This fee is set off against the costs of registration if the name is taken up. A name may be reserved for 28 days, and an applicant may seek an extension of this period for another 28 days only.

Section 61 amends subsection 6(B) of section 128 of the 1963 Act dealing with the documents to be annexed to the annual return. The purpose of this amendment is to clarify that the reference to section 193 in the subsection is to section 193 of the 1990 Act.

Section 62 amends section 195 of the 1963 Act. It provides that a director of a company may notify the CRO of a change in name or address and that one notification can be used to change those details in respect of all companies of which he or she is a director. This was recommended by CLRG in their First Report.

Section 63 amends section 302(1) of the 1963 Act dealing with the enforcement of a duty on a liquidator to make returns to the CRO. It extends the period within which liquidators may comply with notices issued by the CRO to encourage more widespread use of this provision and to avoid time consuming and expensive High Court applications.

Section 64 amends section 371(1) of the 1963 Act and is a similar provision to that of Section 63 but relates to a 'company' and 'officer' as opposed to a liquidator.

Section 65 amends section 12B of the Companies (Amendment) Act 1982. It allows the CRO in proposing to strike a company off the Register of Companies for failure to make annual returns to advertise their intention to do so in the CRO Gazette in cases

where they have no registered office address for the company. It will apply where a company fails to make an annual return for 20 consecutive years and will only relate to companies incorporated prior to 1982 as since then companies must provide a registered office from the date of its incorporation.

Section 66 amends Section 22 of the Companies (Amendment) Act 1986 to provide for the possibility of offences under the Companies (Amendment) Act 1986 being prosecuted on indictment.

Section 67 amends section 19(2) of the 1990 Act. The purpose of the amendment is to extend the instances in which the Director of Corporate Enforcement may require a body to produce specified book or documents to those in which there are circumstances suggesting that (i) the affairs of a body are or have been conducted in a way that is unfairly prejudicial to some or all of its creditors; (ii) certain acts or omissions of the body have been unfairly prejudicial to some part of the members of the body; (iii) certain acts or omissions of the body have been unlawful.

Section 68 repeals section 20(3) of the 1990 Act which imposed limitation periods on the extent to which the Director of Corporate Enforcement (or his officers) could retain material information seized under the authority of a search warrant issued by the District Court. However the existing limitation periods remain unchanged in so far as material information is concerned which was seized before 30 June 2005: the date on which this repeal takes effect.

Section 69 amends section 21(3) of the 1990 Act. This amendment will allow the ODCE to share confidential information with the Irish Auditing and Accounting Supervisory Authority (IAASA) for purposes relevant to IAASA's statutory functions.

Section 70 amends section 166 of the 1990 Act. The purpose of this amendment is to give the courts discretion in certain civil and criminal proceedings whether to require the filing by company directors of certain notices specifying details of their directorships and of any disqualifications to which they are or were subject. Previously it was mandatory for such notices to be filed.

Section 71 amends section 242 of the 1990 Act. Currently, that section makes it an offence to produce, lodge or deliver a document containing false information to the CRO. The amendment extends the offence to a person who completes or signs such a document. This was recommended by CLRG in their First Report.

Section 72 makes several amendments to the Companies Acts to replace the requirement to publish certain notices in *Iris Oifigiúil* with a requirement to publish them in the CRO Gazette. The establishment of the CRO Gazette was provided for in 2004 and facilitates Ireland's application of the First EU Company Law Directive. Essentially, it is a national centrally based electronic gazette which is held and maintained by the CRO on its website.

Section 73 addresses a small number of incorrect references made in Schedule 2 of the Companies (Auditing and Accounting) Act 2003 containing amendments to various offence provisions in the 1963 Act.

Section 74 amends section 110A of the Company Law Enforcement Act 2001 (inserted by Section 52 of the Companies (Auditing and Accounting) Act 2003). The purpose of this amendment is firstly to enable the evidential rules in Sections 110A(2) and (3) to be adopted by or on behalf of the Financial Regulator in respect of functions that, under the Companies Acts, are to be performed by the Financial Regulator. Secondly a new Section 110A(8A) is inserted providing for the admissibility in evidence in all legal proceedings (as of equal validity with the original) of certain certified copies of documents kept by the Financial Regulator.

Links

Text of the First Report of the CLRG can be accessed [here](#)