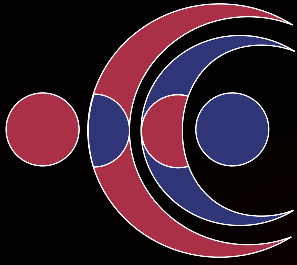

Office of the Director
of Corporate Enforcement

*Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach*

Decision Notice D/2006/2

Revised Guidance on the Duty of Auditors to Report Suspected Indictable Offences to the Director of Corporate Enforcement

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to Report Suspected Indictable Offences
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1.0 Introduction

1.1 Under the Companies Acts and other legislation, the primary responsibility for a company's compliance with legal and regulatory requirements rests with its directors. This responsibility includes reporting to the company's shareholders, keeping proper books of account, safeguarding the assets of the company and taking appropriate steps to prevent fraud and other irregularities.

1.2 The corporate governance structure established in the Companies Acts also provides that, subject to the exemption introduced by Part III of the Companies (Amendment) (No. 2) Act 1999 (as amended), shareholders are entitled to receive a report from an independent auditor as to whether, in that auditor's opinion, the financial statements presented by the directors give a true and fair view of the state of affairs of the company and of its profits (or losses) for the period under review and have been properly prepared in accordance with the accounting provisions of the Companies Acts and on certain other aspects of the directors' responsibilities for financial reporting.

1.3 While auditors perform these duties in the interests of a company's primary stakeholders, namely its shareholders, they also have to have regard to the public interest. Accordingly, in addition to requiring an auditor to report to shareholders, the Companies Acts and other legislation also impose certain duties on auditors to make disclosures to regulatory authorities in the public interest.

1.4 In 2001, the Oireachtas decided that auditors should be required to report to the Director of Corporate Enforcement ("the Director") instances of the suspected commission of indictable offences under the Companies Acts by a company, its officers or agents. Section 74 of the Company Law Enforcement Act 2001 ("the 2001 Act") accordingly introduced this new duty by amending the existing duties of auditors in section 194 of the Companies Act 1990 ("the 1990 Act"). Section 74 was brought into effect on 28 November 2001[1].

1.5 In 2003, section 37 of the Companies (Auditing and Accounting) Act 2003 ("the 2003 Act") made a number of further changes to section 194 of the 1990 Act. These changes sought to provide *inter alia* that the failure to comply with certain obligations to file annual returns would be exempted from the obligation to report to the Director and that auditors would be required to give additional assistance to the Director in his investigation of reported suspected indictable offences under the Companies Acts.

1.6 Sections 73(2)(d) and (3) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 ("the 2005 Act") made a further amendment to section 194 which clarified the provision in the 2003 Act relating to the exemption of auditors from the requirement to report filing defaults to the Director. This exemption provision was commenced with effect from 1 September 2005[2].

1.7 This guidance cannot be construed as a definitive legal interpretation of the relevant provisions. However, it has been developed by the Director and his staff in conjunction with the Auditing Practices Board ("APB"), and the Consultative Committee of Accountancy Bodies – Ireland. In discussing the scope of sections 194(5), (5A) and (5B) of the 1990 Act (as amended) and in applying the terms of relevant auditing standards to those provisions, the Director hopes that the guidance will be of assistance to company stakeholders and auditors in particular.

1 Commencement was achieved in the Company Law Enforcement Act 2001 (Commencement) (No. 3) Order 2001 (S.I. No. 523 of 2001).

2 Commencement was achieved in the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Commencement) Order 2005 (S.I. No. 323 of 2005).

2.0 Section 194 (as amended) of the Companies Act 1990

2.1 The original section 194 of the 1990 Act sets out the duties of auditors where they form the opinion that proper books of account are not being kept by a company and its directors. The amendments to section 194 made by the 2001, 2003 and the 2005 Acts prescribe new or amended reporting requirements for auditors. A copy of section 194 of the 1990 Act, following amendment by section 74 of the 2001 Act, section 37 of the 2003 Act and section 73 of the 2005 Act, is attached at **Appendix 1** to this guidance.

2.2 The primary purpose of this guidance is to outline the scope of the duties which arise for auditors in this context and to address certain issues arising within each part of section 194(5), (5A) and (5B) of the 1990 Act as amended. The requirement under section 194(5) provides as follows:

> *"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(12) 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."*[3]

2.3 Section 37(e) of the 2003 Act introduced sections 194(5A) and (5B) as follows:

> *"(5A) Where the auditors of a company notify the Director of any matter pursuant to subsection (5), they shall, in addition to performing their obligations under that subsection, if requested by the Director—*
>
> *(a) furnish the Director with such further information in their possession or control relating to the matter as the Director may require, including further information relating to the details of the grounds on which they formed the opinion referred to in that subsection,*
>
> *(b) give the Director such access to books and documents in their possession or control relating to the matter as the Director may require, and*
>
> *(c) give the Director such access to facilities for the taking of copies of or extracts from those books and documents as the Director may require.*
>
> *(5B) Nothing in this section compels the disclosure by any person of any information that the person would be entitled to refuse to produce on the grounds of legal professional privilege or authorises the inspection or copying of any document containing such information that is in the person's possession."*

2.4 The reporting obligation applies to all persons practising as Responsible Individuals/ Registered Auditors[4] of companies to which the provision applies. This includes auditors resident outside the State who are legally permitted under the Companies Acts to audit the accounts of such companies.

3 As amended by Section 73(2)(d) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

4 The Institutes of Chartered Accountants in Ireland (ICAI), England & Wales (ICAEW) and Scotland (ICAS) register firms for audit. The Institute of Certified Public Accountants in Ireland (ICPAI) also registers firms. Persons within those firms who are entitled to sign audit reports are known as Responsible Individuals. The Association of Chartered Certified Accountants (ACCA) registers both firms and individuals for audit while the Institute of Incorporated Public Accountants Ltd. (IIPA) registers individuals for audit. Individuals registered by these bodies are known as Registered Auditors.

2.5 Auditing standards[5] also require auditors to exercise adequate control and supervision over their staff conducting audit work. Consequently, as indicated in ISA (UK and Ireland) 250(B) “The Auditor’s Right and Duty to Report to Regulators in the Financial Sector” (paragraph 35), auditors need to ensure that in planning and conducting the audit of a company, staff are alert to the possibility that a report may be required. Auditors should also refer to ISA 220 “Quality Control for Audits of Historical Financial Information” for further guidance on this matter. ISA (UK and Ireland) 250(B) also states that auditing firms need to establish adequate procedures to ensure that any matters which are discovered in the course of, or as a result of, audit work which may give rise to a report are brought to the attention of the engagement partner on a timely basis (ISA (UK and Ireland) 250(B) paragraph 36).

3.0 Auditing Standards

3.1 A number of standards are of relevance to this subject. These include, primarily, ISA (UK and Ireland) 250(A) “Consideration of Law 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”. Paragraph 38-3 of ISA (UK and Ireland) 250(A) indicates that the procedures and guidance set out in ISA (UK and Ireland) 250(B) can be adapted to other circumstances in which the auditor becomes aware of a suspected instance of non-compliance with laws or regulations which the auditor is under a statutory duty to report. Where applicable, reference is made to these Standards in the text of this guidance.

5 International Standards on Auditing (UK and Ireland) may be accessed through the APB website at www.frc.org.uk/apb.

4.0 Non-Audit Assignments

"Where in the course of, and by virtue of, their carrying out an audit of the accounts of a company…"

4.1 The subsection indicates that the obligation on auditors to report a suspected indictable offence under the Companies Acts to the Director of Corporate Enforcement arises where auditors are undertaking an audit of the financial statements of a company. In general therefore, the reporting obligation does not apply to persons providing non-audit services to a company. Similarly, the subsection does not impose a legal obligation on persons undertaking non-audit services to inform the auditors within their firm of the information which has come into their possession.

4.2 However, where a person performs, or has performed, non-audit work for a company for whom s/he 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.

4.3 The statutory duty to report to a regulator applies to information which comes to the attention of auditors in their capacity as such. In determining whether information is obtained in that capacity, ISA (UK and Ireland) 250(B) identifies two criteria in particular which need to be considered, namely:

(i) whether the person who obtained the information also undertook the audit work and, if so,

(ii) whether it was obtained in the course of, or as a result of, undertaking the audit work (ISA (UK and Ireland) 250(B) Appendix 2 - paragraph 6).

4.4 Where partners or staff involved in the audit of an entity carry out work other than the audit (i.e. non-audit work), information about the entity will be known to them as individuals. In circumstances which suggest that a matter would otherwise give rise to a statutory duty to report if obtained in the capacity of auditor, it will be prudent for them to make enquiries in the course of their audit work in order to establish whether this is the case from information obtained in that capacity (ISA (UK and Ireland) 250(B) Appendix 2 - paragraph 8).

4.5 Where non-audit work is carried out by other partners or staff, neither of the aforementioned criteria (at (i) and (ii) above) are satisfied in respect of the information that becomes known to them. Nevertheless, in such circumstances, ISA (UK and Ireland) 250(B) states that the firm in question should take proper account of such information when it could affect the audit so that it is treated in a responsible manner, particularly since in partnership law the knowledge obtained by one partner in the course of partnership business may be imputed to the entire partnership (ISA (UK and Ireland) 250(B) Appendix 2 - paragraph 9).

4.6 A firm appointed as auditor of an entity needs to have in place appropriate procedures to ensure that the partner responsible for the audit function is made aware of any relationship which exists between any department of the firm and the regulated entity when that relationship could affect the firm's work as auditor (ISA (UK and Ireland) 250(B) Appendix 2 - paragraph 10).

4.7 The ISA goes on to state that, *prima facie*, information obtained in the course of non-audit work is not covered by the duty to report. However, the firm appointed as auditor needs to consider whether the results of other work undertaken for the entity in question needs to be assessed as part of the audit process. In principle this is no different to seeking to review a report prepared by outside consultants on the entity's accounting systems so as to ensure that the auditor makes a proper assessment of the risks of misstatement in the financial

statements and of the work needed to form an opinion. Consequently, the partner responsible for the audit needs to make appropriate enquiries in the process of planning (see below) and completing the audit. Such enquiries would be directed to those aspects of the non-audit work which might reasonably be expected to be relevant to the audit (ISA (UK and Ireland) 250(B) Appendix 2 - paragraph 11).

4.8 In the context of the foregoing, the provisions of ISA (UK and Ireland) 300 "Planning an Audit of Financial Statements", ISA (UK and Ireland) 210 "Terms of Audit Engagements", and ISA (UK and Ireland) 315 "Understanding the Entity and its Environment and Assessing the Risks of Material Misstatement" are also of particular relevance. Auditors are required by these standards to:

- plan the audit (ISA (UK and Ireland) 300),
- agree the terms of engagement with the client (ISA (UK and Ireland) 210), and
- obtain an understanding of the entity and its environment (ISA (UK and Ireland) 315).

4.9 In planning the audit, agreeing the terms of engagement, and obtaining a knowledge of the business, the auditor is expected to consider all material relevant to the audit including:

- internal controls relevant to the audit (ISA (UK and Ireland) 315 paragraph 41),
- relevant industry, regulatory and other external factors (ISA (UK and Ireland) 315 paragraph 22),
- scope of the audit, including reference to applicable legislation (ISA (UK and Ireland) 210 paragraph 6), and
- where relevant information about the entity and its environment obtained in prior periods (ISA (UK and Ireland) 315 paragraph 12).

4.10 ISA (UK and Ireland) 300 is framed in the context of recurring audits. However, it draws auditors' attention (in paragraph 29) to the fact that "*for an initial audit, the auditor may need to expand the planning activities because the auditor does not ordinarily have the previous experience with the entity that is considered when planning recurring engagements*".

4.11 Compliance with the provisions of International Standards on Auditing (UK and Ireland) 250, 300 and 315 respectively may result in auditors successfully identifying any matters arising from non-audit work that may require them to make a report to the Director pursuant to their obligations under section 194(5) of the 1990 Act.

4.12 With regard to the point in time at which auditors' reporting obligations arise in respect of matters first identified in the course of providing non-audit services:

- where a person providing non-audit services to a company becomes aware of an indictable offence and s/he also acts as the auditor of that company, the obligation to report the suspected indictable offence will arise when the auditor comes into possession of the information in question as part of the undertaking of the audit, and
- where a person providing non-audit services to a company becomes aware of an indictable offence and s/he is subsequently appointed to act as the auditor of that company, the obligation to report the suspected indictable offence will arise when the auditor comes into possession of the information in question as part of the undertaking of the audit.

5.0 Reportable Information

"...information comes into the possession of the auditors of a company..."

5.1 The provision indicates that the obligation on auditors to report to the Director of Corporate Enforcement arises when information comes into their possession as part of the undertaking of the audit. Without prejudice to the above guidance on the need for proper audit planning and associated requirements, the Director does not regard the obligation as requiring 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 to make the necessary enquiries to enable them to form a considered opinion on the question.

5.2 ISA (UK and Ireland) 250(A) sets out standards and guidance for auditors on the consideration of law and regulations. It requires that "*the auditor should plan and perform the audit with an attitude of professional scepticism, recognising that the audit may reveal conditions or events that could lead to questioning whether an entity is complying with law and regulations.*" (ISA (UK and Ireland) 250(A) paragraph 13).

5.3 ISA (UK and Ireland) 250(A) requires that "*in order to plan the audit, the auditor should obtain a general understanding of the legal and regulatory framework applicable to the entity and the industry and how the entity is complying with that framework.*" (ISA (UK and Ireland) 250(A) paragraph 15).

5.4 The ISA also indicates that in obtaining a general understanding of the legal and regulatory framework applicable to an entity and procedures followed to ensure compliance with this framework, auditors would particularly recognise that non-compliance with some laws and regulations may give rise to business risks that have a fundamental effect on the operations of the entity. That is, non-compliance with certain laws and regulations may cause the entity to cease operations, or call into question the entity's continuance as a going concern. For example, non-compliance with the requirements of the entity's licence or other title to perform its operations could have such an impact (for example, for a bank, non-compliance with capital or investment requirements) (ISA (UK and Ireland) 250(A) paragraph 16).

5.5 The ISA goes on to state that "*To obtain the general understanding of laws and regulations, the auditor would ordinarily*:

- *Use the existing understanding of the entity's industry, regulatory and other external factors*;
- *Inquire of management concerning the entity's policies and procedures regarding compliance with laws and regulations*;
- *Inquire of management as to the laws or regulations that may be expected to have a fundamental effect on the operations of the entity*;
- *Discuss with management the policies or procedures adopted for identifying, evaluating and accounting for litigation claims and assessments*; and
- *Discuss the legal and regulatory framework with auditors of subsidiaries in other countries (for example, if the subsidiary is required to adhere to the securities regulations of the parent company).*" (ISA (UK and Ireland) 250(A) paragraph 17).

5.6 The auditor should then perform further audit procedures to help identify instances of non-compliance with those laws and regulations where non-compliance should be considered when preparing financial statements, specifically:

- Inquiring of management as to whether the entity is in compliance with such laws and regulations; and
- Inspecting correspondence with the relevant licensing or regulatory authorities.

- Enquiring of those charged with governance as to whether they are on notice of any such possible instances of non-compliance with law or regulations. (ISA (UK and Ireland) 250(A) paragraph 18).

5.7 The auditor's procedures should be designed to help identify possible or actual instances of non-compliance with those laws and regulations which provide a legal framework within which the entity conducts its business and which are central to the entity's ability to conduct its business and hence to its financial statements. (ISA (UK and Ireland) 250(A) paragraph 18-1).

5.8 On discovery of a possible instance of non-compliance, the ISA provides the following direction to auditors: "*when the auditor becomes aware of information concerning a possible instance of non-compliance, the auditor should obtain an understanding of the nature of the act and the circumstances in which it has occurred and sufficient other information to evaluate the possible effect on the financial statements*" (ISA (UK and Ireland) 250(A) paragraph 26).

5.9 The ISA goes on to state that when evaluating the possible effect on the financial statements, the auditor considers, *inter alia*, "*the potential financial consequences, such as fines, penalties, damages, threat of expropriation of assets, enforced discontinuation of operations and litigation*" (ISA (UK and Ireland) 250(A) paragraph 27).

5.10 It is clear, therefore, that 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 properly evaluate the possible effects on the financial statements, including the potential consequences of any fines or other sanctions (imposed on the company, its directors or officers) which might result from that non-compliance.

5.11 In general, the maximum penalty on conviction on indictment (see section 9.0 – Indictable Offences) of an indictable offence under the Companies Acts is €12,700 and/or 5 years' imprisonment. However, the Companies Acts also provide for considerably higher sanctions in respect of certain offences, e.g., fraudulent trading (€63,000 and/or 7 years' imprisonment) and insider dealing/market abuse (€10,000,000 and/or 10 years' imprisonment). Moreover, persons convicted on indictment of an indictable offence involving fraud or dishonesty are automatically disqualified from acting as company directors/officers. The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person:

- guilty of two or more offences of failing to maintain proper books and records, or,
- guilty of three or more defaults under the Companies Acts.

5.12 Accordingly, the conviction on indictment of a company or any of its officers under the Companies Acts and any consequential claims arising can have potentially very serious consequences for the company and its continuing operations, and by extension on its financial statements.

5.13 In the context of their investigations, section 193(3) of the Companies Act 1990 entitles auditors, *inter alia*, to require from the officers of the company such information as they think necessary for the performance of their duties. If an auditor is unable, as part of the audit, to obtain information regarding a potential breach due to the non co-operation of one of the company's officers or agents, this in itself constitutes a suspected indictable offence under section 197[6] of the 1990 Act. Naturally, any such non co-operation will also have to be taken into account by an auditor when:

6 Section 197(3) Companies Act 1990 states: "*An officer of a company who fails to provide to the auditors of the company or of the holding company of the company, within two days of the making of the relevant request, any information or explanations that the auditors require as auditors of the company or of the holding company of the company and that is within the knowledge of or can be procured by the officer shall be guilty of an offence*".

- forming his or her audit opinion,
- drafting the audit report under section 193(4) of the Companies Act 1990,
- deciding whether to continue in office or to decline re-appointment.

5.14 In the event that an auditor was to resign or to decline re-appointment in such circumstances, s/he would be obliged under section 185 of the 1990 Act to:

- serve a notice of resignation on the company (subsection (1)),
- provide in the notice a statement of the circumstances which should be brought to the attention of the members or creditors of the company (subsection (2)), and
- copy the notice to the Registrar of Companies within 14 days (subsection (3)).

6.0 Legal or Other Professional Advice

"…that leads them to form the opinion that there are reasonable grounds for believing…"

6.1 Section 194(5) requires auditors to exercise their professional judgement in determining if the information and evidence in their possession leads to the formation of the opinion that the matter is reportable to the Director of Corporate Enforcement by virtue of providing reasonable grounds for a belief that an indictable offence has been committed. A collective judgement may be made in the case of an auditing firm. While there is no obligation on auditors to obtain legal or other professional advice before forming that opinion, the Director recognises that auditors may wish to seek such independent advice as part of the process of forming their opinion.

6.2 Where legal or other professional advice is obtained by the company in relation to the matter(s) about which the auditor has concerns, the auditor is similarly required to exercise professional judgement in determining if the information is reportable to the Director of Corporate Enforcement. While in many cases auditors could expect to be satisfied with legal advice emanating from a reputable source, auditors would not be entitled to rely on such advice if, having taken it into account, they formed the opinion that the advice was in error, incomplete or otherwise inadequate by reference to the information in their possession.

7.0 Reportable Persons

"…that the company or an officer or an agent of it…"

7.1 In the subsection, "*the company*" is the company which is being audited by the auditor ("Company A"). Subject to what follows, the reporting obligation does not therefore extend to another company ("Company B"), which the auditor of Company A may believe has committed a reportable offence.

7.2 In addition, the term "*company*" must comply with the general definition of company in the Companies Act 1963 which is "*a company formed and registered under this Act, or an existing company*".

7.3 The term "*existing company*" is separately defined as "*a company formed and registered in a register kept in the State under the Joint Stock Companies Acts, the Companies Act, 1862 or the Companies (Consolidation) Act, 1908*".

7.4 The reporting obligation on auditors imposed by the subsection does not extend to companies formed outside the State, even where they may be registered as having an established place of business within the State under the Companies Acts or where they operate through a branch (under the European Communities (Branch Disclosure) Regulations 1993).

7.5 The term "*officer*" is defined in section 2(1) of the Companies Act, 1963. It states that "*'officer' in relation to a body corporate includes a director or secretary*". The term officer also includes the company's auditor in certain specified circumstances.

7.6 In relation to certain offences under the Companies Acts, the term officer is extended to include shadow directors. The term "*shadow director*" is specifically defined in section 27 of the 1990 Act as "*a person in accordance with whose directions or instructions the directors of a company are accustomed to act*". Accordingly, where the suspected offence is one which applies to shadow directors, the term officer includes shadow directors.

7.7 Where the audit is of the consolidated financial statements of a group of companies, the obligation to report applies to each group company individually.

7.8 The reporting obligation extends to either of the following circumstances:

- where the reportable offence by the officer of Company A relates to that company, or,
- where the reportable offence by the officer of Company A relates to a matter outside of that company. In other words, a suspected indictable offence by an officer of Company A relating to his or her involvement in Company B is eligible to be reported by the auditor of Company A.

7.9 In the subsection, the term "agent" must comply with the general definition of agent in section 2(1) of the Companies Act, 1963, which states "*'agent' does not include a person's counsel acting as such*". The term "agent" is commonly understood to refer to any person authorised to bind the company. Therefore, a company's solicitor, acting in a capacity that binds the company, may be an agent of the company in certain circumstances.

7.10 Again, the reporting obligation extends to either of the following circumstances:

- where the reportable offence by the agent of Company A relates to that company, or
- where the reportable offence by the agent of Company A relates to a matter outside of that company. In other words, a suspected indictable offence by an agent of Company A relating to his or her involvement in Company B is eligible to be reported by the auditor of Company A.

7.11 While the preceding paragraphs set out the general guidance to auditors on this matter, it is recognised that in many circumstances, auditors will not be in a position to obtain sufficient information to allow the formation of an opinion as to whether an officer or agent of Company A has committed an indictable offence in relation to Company B.

8.0 Standard of Certainty

"…has committed…"

8.1 The term "*has committed*" is obviously of a higher standard of certainty than "*might have committed*" or even "*may have committed*". Where auditors detect a suspected reportable breach of the Companies Acts, they should obtain sufficient information to enable the formation of the opinion as to whether there are reasonable grounds to conclude that an indictable offence has been committed.

8.2 ISA (UK and Ireland) 250(B) provides the following guidance to auditors in this regard: "*In assessing the effect of an apparent breach, the auditor takes into account the quantity and type of evidence concerning such a matter which may reasonably be expected to be available. If the auditor concludes that the auditor has been prevented from obtaining all such evidence concerning a matter which may give rise to a duty to report, the auditor would normally make a report direct to the regulator without delay.*" (ISA (UK and Ireland) 250(B) paragraph 41).

8.3 ISA (UK and Ireland) 250(B) requires auditors to exercise their professional judgement. In forming that judgement, auditors undertake appropriate investigations to determine the circumstances but do not require the degree of evidence which would be a normal part of forming an opinion on financial statements. ISA (UK and Ireland) 250(B) goes on to state that the appropriate investigations performed by auditors in these circumstances would normally include:

- enquiry of staff at an appropriate level,
- review of correspondence and documents relating to the transaction or event concerned, and
- discussion with those charged with governance or other senior management as appropriate (ISA (UK and Ireland) 250(B) paragraph 44).

9.0 Indictable Offences

"…an indictable offence under the Companies Acts (other than an indictable offence under section 125(2) or 127(12) of the Principal Act)…"

9.1 Under the Companies Acts, provision is made for two types of criminal offence, namely summary and indictable offences. A summary offence is generally of a less serious nature and is tried before a judge only in the District Court. Indictable offences are generally of a more serious nature. Indictable offences can, in the same way as summary offences, be tried in the District Court before a judge only. However, the distinction between a summary offence and an indictable offence is that, due to their more serious nature, indictable offences can also be tried in the Circuit Court, i.e., before a judge and jury. Where this course is taken, the indictable offence is said to be prosecuted on indictment. Where an offence is prosecuted on indictment, the penalties provided for by the law on conviction are generally considerably higher than had the offence been prosecuted summarily.

9.2 The sole prosecuting authority for indictable offences is the Director of Public Prosecutions (DPP). It is a matter for the Director of Corporate Enforcement to determine in any particular case if the suspected indictable offence reported to him by an auditor should be prosecuted summarily or referred to the DPP. Where a case is referred to the DPP by the Director of Corporate Enforcement, the DPP will subsequently make an independent decision as to whether or not it should actually be prosecuted on indictment. In practice, the DPP may decide to refer a matter to the Garda Síochána for further investigation before making a final decision.

9.3 With regard to the Company Law Enforcement Act 2001, the Oireachtas has decided that the obligation on auditors to report applies only to indictable offences[7] and not to all offences under the Companies Acts. The only exceptions to this are sections 125(2) and 127(12) of the Companies Act 1963 (as amended) which relate to the filing of annual returns.

9.4 In considering whether or not to report a suspected offence, auditors are required to determine if in fact the offence in question is an indictable offence. It is not the duty of auditors under section 194(5) to make any other evaluation as to the seriousness or otherwise of an actual or potential offence. For example, it is of no relevance to the formation of an auditor's opinion under section 194(5) as to:

- whether the suspected offence has any impact on the company's financial statements or on the auditor's opinion as to whether or not the financial statements give a true and fair view of the state of affairs of the company. It is quite possible that an auditor may be in a position to give an unqualified audit report and yet be required to report a suspected indictable offence to the Director;
- what the policy of the Director of Corporate Enforcement or the Director of Public Prosecutions is with respect to the prosecution of indictable offences of a particular type. In other words even if it is their policy to prosecute certain offences summarily, this is not a matter which should affect the formation of the auditor's opinion in respect of the reporting of any suspected indictable offence;
- the extent to which the suspected indictable offence might involve a financial or other loss to any person. While this may be taken into account by the prosecuting authority in deciding whether or not to prosecute a case, the auditor has no role in making that adjudication on behalf of the prosecutor;

7 A current list of indictable offences under the Companies Acts is available on the ODCE website (http://www.odce.ie/) for the convenience of reporting auditors. It is the Director's intention to update this list as required.

- whether the suspected offence may or may not have already been brought to the attention of the Director of Corporate Enforcement by the company, one of its officers or agents or another party. It is possible that any such report may not have included all relevant facts and details of the circumstances giving rise to the auditor's concerns. Accordingly, it is necessary that the auditor provide his or her independent opinion of the suspected indictable offence which has been committed;

- whether or not circumstances giving rise to the offence have been rectified or otherwise settled. Again, this is a matter which may be taken into account by the prosecuting authority in deciding whether or not to prosecute a case, but it is likely that circumstances will arise from time to time where rectification of the circumstances is not in itself a sufficient response to the indicated offence.

9.5 In addition to considering whether a suspected offence falls to be reported to the Director of Corporate Enforcement, the auditor assesses whether the particular circumstances indicate reportable offences under the Criminal Justice Act 1994 (in respect of money laundering) and the Criminal Justice (Theft and Fraud Offences) Act 2001 and, where appropriate, report these to the Garda Síochána and the Revenue Commissioners.

10.0 Timing of Formation and Notification of Opinion

"…the auditors shall, forthwith after having formed it, notify that opinion to the Director…"

10.1 The provision indicates that auditors are required to notify the Director of their opinion immediately after forming an opinion that there are reasonable grounds to conclude that an indictable offence has been committed. ISA (UK and Ireland) 250(B) is broadly consistent with this provision in requiring that "*when the auditor concludes, after appropriate discussion and investigations, that a matter which has come to the auditor's attention gives rise to a statutory duty to make a report, the auditor should bring the matter to the attention of the regulator without undue delay…*" (ISA (UK and Ireland) 250(B) paragraph 50).

10.2 While there will be circumstances where it is readily apparent that an indictable offence has been committed and that a report is required, there will be other circumstances where the immediate formation of an opinion may not be possible by virtue of auditors having to obtain and assess additional information from the company, its officers and employees.

10.3 Notwithstanding the foregoing, auditors will have to consider carefully the nature of the circumstances which have come to light in determining whether the formation of an opinion is urgent and, having formed that opinion, whether to report immediately to the Director. Such circumstances might for example include those where the effectiveness of any enforcement or other remedial action by the Director would be compromised by any delay in the formation and notification of the auditor's opinion. Such instances might typically include (but are not restricted to) those involving:

- breaches of requirements concerning the issue of shares;

- failure to observe the requirements of section 60 of the Companies Act 1963 while providing financial assistance for the purchase by a company of its own shares;

- falsification of records and/or documents;
- fraudulent trading;
- acquisition of own shares in contravention of a prohibition on their acquisition;
- illegal transactions involving directors;
- insider dealing/market abuse;
- disqualified person acting in contravention of a disqualification order;
- restricted director acting in contravention of the terms of a restriction order;
- failure to keep proper books of account;
- furnishing false information in purported compliance with any provision of the Companies Acts;
- knowingly or recklessly making a statement to an auditor, which is materially misleading, false or deceptive.

11.0 Details of the Grounds

"…and provide the Director with details of the grounds on which they have formed that opinion."

11.1 Auditors should provide sufficient information in support of their opinion to enable the Director to evaluate properly the circumstances suggesting the commission of an indictable offence. This guidance is supported by ISA (UK and Ireland) 250(B) which requires, *inter alia*, "*the auditor should bring the matter to the attention of the regulator…in a form and manner which will facilitate appropriate action by the regulator*" (ISA (UK and Ireland) 250(B) paragraph 50).

11.2 The information provided by auditors as part of their reports to the Director of Corporate Enforcement should include:

- auditor details;
- statutory authority under which the report is being made;
- details of the company/person(s) who are the subject of the report;
- whether the matter has been discussed with the directors and/or relevant officer(s) and/or agent(s) of the company;
- details of the suspected indictable offence(s);
- details of the grounds on which the auditor has formed the opinion that an indictable offence has been committed. Auditors should ensure that this description is of sufficient detail to facilitate appropriate action by the Director;
- the context in which the report is being made. ISA (UK and Ireland) 250(B) offers guidance to auditors as to the type of information that might be included in this regard e.g.
  - the extent to which the auditor has investigated the circumstances giving rise to the matter reported, and

- whether steps to rectify the matter have been taken (ISA (UK and Ireland) 250(B) paragraph 63).

- any other information considered relevant by the auditor;
- auditor's signature;
- date of report.

11.3 The ODCE publication "A Guide to Transactions Involving Directors" sets out information that, if known to the auditor as a result of audit work, the Director considers useful to include as part of the report to his Office where the subject matter of the report is a suspected offence under section 40 of the Companies Act 1990, indicating a loan to a director(s) exceeding 10% of the company's relevant assets. Such information includes, if possible:

- the date(s) on which the loan(s) was/were advanced;
- the identity of each individual to whom the loan(s) was/were given;
- the value of the loan(s);
- whether the company's relevant assets were calculated by reference to the company's net assets as shown in the last preceding financial statements laid before an AGM or by reference to the company's called up share capital; and
- the extent to which 10% of the company's relevant assets were exceeded by the loan(s)[8].

Where such information is not readily available to the auditor (i.e., from information contained in the audit working papers), the auditor refers the Director to the company and its directors.

11.4 Auditors may afford the company's officer(s) or agent(s), as appropriate, the opportunity to compile a statement for submission to the Director of Corporate Enforcement together with the auditor's report. Issues that the officer(s) or agent(s) may wish to address if they choose to prepare such a statement might include, for example, their views on the report's subject matter and details of any corrective or remedial action taken or proposed.

11.5 However, where the officer(s) or agent(s) elect to submit a statement to the Director, auditors should ensure that their reports are not delayed. Accordingly, it is recommended that in such circumstances, auditors should allow a period of two days for the furnishing of statements by the officer(s) or agent(s), after which time auditors should submit their report. Naturally, the officer(s) or agent(s) can, if they so wish, subsequently furnish a statement to the Director.

11.6 While section 194(5) does not expressly provide for a standard report form, the Director of Corporate Enforcement has prepared a form which auditors may find useful in discharging their reporting obligations under the Act[9].

8 Section 8.2, Contents of Auditors' Reports, excerpt from "A Guide to Transactions Involving Directors", published by the ODCE in November 2003.

9 A copy of the Indictable Offences Report Form is available on the ODCE website at www.odce.ie.

12.0 Provision of Further Information by Auditors to the Director

12.1 Section 37(e) of the Companies (Auditing and Accounting) Act 2003 extends the responsibilities of auditors in situations where they make a report to the Director under Section 194(5) of the Companies Act 1990. In particular, it provides in a new subsection (5A) that if requested by the Director, auditors shall:

"*(a) furnish the Director with such further information in their possession or control relating to the matter as the Director may require, including further information relating to the details of the grounds on which they formed the opinion referred to in that subsection,*

(b) give the Director such access to books and documents in their possession or control relating to the matter as the Director may require, and

(c) give the Director such access to facilities for the taking of copies of or extracts from those books and documents as the Director may require."

12.2 The purpose of this additional provision is to enable the Director to acquire on an efficient and effective basis the quality of information and evidence which initially led the auditor to report the suspected offence and thereby to facilitate the Director in reaching an informed decision as to what enforcement action (if any) is warranted by him as a result of the indicated circumstances.

12.3 The decision of the Director as to whether he will close the case without further action, recommend administrative resolution of the case perhaps by way of letter, or commence the preparation of a case for legal proceedings, depends on him having access to the fullest possible information concerning the incident or incidents that gave rise to the auditor's report. Every report made to the Office is dealt with in this manner so it is to the benefit of all parties that this information be gathered as efficiently as possible.

12.4 The information or books and documents to be made available is limited only to that which is actually in the possession of the auditor or under his control. The term "*books and documents*" is defined in section 3(1) of the 1990 Act as including "*accounts, deeds, writings and records made in any other manner*". Accordingly, the information, books and documents to be made available comprise both electronic and physical materials.
It should be noted that the auditor is not required to provide original documentation, and there is no requirement to seek out additional information beyond that which is in the auditor's possession or control as a result of a request under this section.

12.5 Section 194(5B) of the 1990 Act makes clear that the Director's right to the information, books and documents referred to in section 194(5A) does not extend to material which is covered by legal professional privilege. An auditor can accordingly properly refuse to provide such material. **Appendix 2** provides commentary on legal professional privilege.

12.6 The meaning of the phrase "relating to the matter" will depend on the particular circumstances of each report and the nature and amount of information in the possession of the auditor. It would be impossible to produce a definitive list of all information that could relate to the matter and could be in the possession or control of the auditor, as this will vary with each offence and with the amount and quality of information that the auditor has in his/her possession or control.

12.7 Books and documents may include records of meetings or discussions considering the issue directly, documentation on how the opinion that there are reasonable grounds for believing that an indictable offence has been committed was reached, working papers that highlight the matter as part of the audit fieldwork, as well as any other documents in the possession or control of the auditors that relate to the matter. Other documents may include client records and files or other documents relating to non-audit services provided to the company and that relate to the matter reported and are in the possession or control of the auditor.

12.8 In response to the receipt of an indictable offence report, an officer or officers of the Director may, pursuant to section 194(5A) of the 1990 Act, seek to acquire the further information and documents by way of correspondence and/or meeting and/or discussion. Where an officer or officers attends at the office of an auditor, the auditor may be required to make available facilities for the copying of relevant books or documents in the auditor's possession.

13.0 Protection Against Liability

13.1 Section 194(6) of the 1990 Act, which was inserted by section 74(e) of the 2001 Act, protects auditors from liability in discharging their legal duties under section 194. This protection covers the following circumstances:

- the reporting to the Registrar of Companies by auditors of any failure to keep proper books of account (section 194(1)(b) of the 1990 Act);
- the requirement on auditors to give the Director of Corporate Enforcement access to documentation and provide such information and explanations as the Director may require to investigate the circumstances giving rise to the auditor's notice to the Registrar above (section 194(3A) of the 1990 Act);
- the requirement on auditors to report to the Director their opinion that a suspected indictable offence has been committed under the Companies Acts and to provide the Director with details of the grounds for that opinion (section 194(5) of the 1990 Act);
- the new requirement on auditors to give the Director information, and access to books and documents relating to the suspected indictable offence report (new section 194(5A) of the 1990 Act).

13.2 In addition to the statutory protection afforded to auditors under the section, professional standards also offer auditors guidance on this matter. ISA (UK and Ireland) 250(B) (Appendix 1 paragraph 9) states:

"*Confidentiality is an implied term of the auditor's contracts with client entities. However, in the circumstances leading to a right or duty to report, the auditor is entitled to communicate with regulators in good faith information or opinions relating to the business or affairs of the entity or any associated body without contravening the duty of confidence owed to the entity.*"

14.0 Reporting of Suspected Offences Beyond the Scope of Section 194(5) in the Public Interest

14.1 ISA (UK and Ireland) 250(A) indicates, *inter alia*, that where the auditor becomes aware of a suspected or actual instance of non-compliance with law or regulations which does not give rise to a statutory duty to report to an appropriate authority, the auditor considers whether the matter is one that ought to be reported to a proper authority in the public interest, and where this is the case, they discuss the matter with those charged with governance. (ISA (UK and Ireland) 250(A) paragraph 38-4).

14.2 ISA (UK and Ireland) 250(A) (paragraph 38-9) states that 'Public Interest' is a concept that is not capable of general definition. Each situation must be considered individually. Matters to be taken into account when considering whether disclosure is justified in the public interest may include:

- the extent to which the suspected or actual non-compliance is likely to affect members of the public;
- whether those charged with governance have rectified the matter or are taking, or likely to take, effective corrective action;
- the extent to which non-disclosure is likely to enable the suspected or actual non-compliance to recur with impunity;
- the gravity of the matter;
- whether there is a general ethos within the entity of disregarding law or regulations;
- the weight of evidence and the degree of the auditors' suspicion that there has been an instance of non-compliance with law or regulations.

14.3 The protection afforded to auditors under section 194(6) of the 1990 Act does not extend to public interest reporting. ISA (UK and Ireland) 250(A) provides guidance to auditors under these circumstances. While ISA (UK and Ireland) 250(A) provides the following guidance, auditors may need to take legal advice before making a decision on whether the matter should be reported to a proper authority in the public interest.

14.4 ISA (UK and Ireland) 250(A) states that "*determination of where the balance of public interest lies requires careful consideration. An auditor whose suspicions have been aroused uses professional judgment to determine whether the auditor's misgivings justify the auditor in carrying the matter further or are too insubstantial to deserve reporting*." (ISA (UK and Ireland) 250(A) paragraph 38-8).

14.5 Auditors are protected from the risk of liability for breach of confidence or defamation provided that:

- in the case of breach of confidence:
  - the disclosure has been made in the public interest, and,
  - such disclosure has been made to an appropriate body or person, and
  - there has been no malice motivating the disclosure (ISA (UK and Ireland) 250(A) paragraph 38-8).
- in the case of defamation:
  - disclosure has been made in their capacity as auditors of the entity concerned, and
  - there has been no malice motivating the disclosure (ISA (UK and Ireland) 250(A) paragraph 38-8).

14.6 It is important, in order for auditors to retain the protection of qualified privilege that they report to the proper authorities. A footnote to paragraph 38-8 of ISA (UK and Ireland) 250(A) identifies the Department of Enterprise, Trade & Employment and the Director of Corporate Enforcement as being among those authorities to whom it is proper to make a report in the public interest. Auditors receive the same protection even if they have only a reasonable suspicion that non-compliance with law or regulations has occurred. ISA (UK and Ireland) 250(A) paragraph 38-10 indicates that auditors who can demonstrate that they have acted reasonably and in good faith in informing an authority of a breach of law or regulations which they think has been committed would not be held by the court to have been in breach of duty to the client even if, an investigation or prosecution having occurred, it were to be found that there had been no offence.

14.7 The ISA goes on to state that:

- the auditor needs to remember that the auditor's decision as to whether to report, and if so to whom, may be called into question at a future date, for example on the basis of:
  - what the auditor knew at the time;
  - what the auditor ought to have known in the course of the audit;
  - what the auditor ought to have concluded, and
  - what the auditor ought to have done (ISA (UK and Ireland) 250(A) paragraph 38-11);
- the auditor may also wish to consider the possible consequences if financial loss is occasioned by non-compliance with law or regulations which they suspect (or ought to suspect) has occurred but decide not to report (ISA (UK and Ireland) 250(A) paragraph 38-11).

14.8 Where, having considered any views expressed on behalf of the entity and in the light of any legal advice obtained, the auditor concludes that the matter ought to be reported to an appropriate authority in the public interest, the auditor notifies those charged with governance in writing of their view and, if the entity does not voluntarily do so itself or is unable to provide evidence that the matter has been reported, the auditor reports it (ISA (UK and Ireland) 250(A) paragraph 38-5). The auditor reports a matter to the proper authority in the public interest and without discussing the matter with the entity if the auditor concludes that the suspected or actual instance of non-compliance has caused the auditor no longer to have confidence in the integrity of those charged with governance (ISA (UK and Ireland) 250(A) paragraph 38-6)[10].

10 In the event that an auditor wishes to make a report in the public interest to the ODCE, a Complaint Form, which is available on the ODCE website at www.odce.ie, may be used for this purpose.

15.0 The Director's Response to Auditors' Reports

15.1 Every auditor's report received will be examined by the Office of the Director of Corporate Enforcement and an acknowledgement issued. Where considered necessary, clarification or further information will be sought from the directors, auditor or other persons as required for example under the provisions of Section 194(5A) and (5B). Assuming that a *prima facie* breach of the Companies Acts is disclosed, the Director and his officers will consider various matters before determining the next step. These include:

- whether the offence is proper to the Director's Office. It may be, for instance, that the offence is better handled by another authority,
- what additional evidence may be required by way of documentation or oral statements from the company, its officers, agents or third parties to address the indicated breach and the manner in which such evidence should be obtained,
- the seriousness of the suspected offence,
- whether the offence has been remedied and the extent to which the remedy in itself is a sufficient outcome,
- the urgency of the case, and
- the extent to which viable options are available to the Director to remedy or sanction the suspected offence.

15.2 Where action is appropriate by his Office, the Director will endeavour to respond in a manner which is likely to be both effective and proportionate in relation to the indicated offence.

Appendix 1

Section 194 of the Companies Act 1990

as amended by Section 74 of the 2001 Act, Section 37 of the 2003 Act and Section 73 of the 2005 Act

(Please note that the text as amended by the 2003 and 2005 Acts is underlined)

Duty of auditors if proper books of account are not being kept

194. (1) If, at any time, the auditors of a company form the opinion that the company is contravening, or has contravened, *section 202* by failing to cause to be kept proper books of account (within the meaning of that section) in relation to the matters specified in *subsections (1)* and *(2)* of that section, the auditors shall—

(a) as soon as may be, by recorded delivery, serve a notice in writing on the company stating their opinion, and

(b) not later than 7 days after the service of such notice on the company, notify the registrar of companies in the prescribed form of the notice and the registrar shall forthwith forward a copy of the notice to the Director.

(2) Where the auditors form the opinion that the company has contravened *section 202* but that, following such contravention, the directors of the company have taken the necessary steps to ensure that proper books of account are kept as required by that section, *subsection (1)(b)* shall not apply.

(3) This section shall not require the auditors to make the notifications referred to in *subsection (1)* if they are of opinion that the contraventions concerned are minor or otherwise immaterial in nature.

(3A) Where the auditors of a company file a notice pursuant to *subsection (1)(b)*, they shall, if requested by the Director—

(a) furnish to the Director such information, including an explanation of the reasons for their opinion that the company has contravened section 202, and

(b) give to the Director such access to <u>books and</u> documents, including facilities for inspecting and taking copies, being information<u>, books</u> or documents in their possession or control and relating to the matter the subject of the notice, as the Director may require.

(3B) Any written information given in response to a request of the Director under *subsection (3A)* shall in all legal proceedings be admissible without further proof, until the contrary is shown, as evidence of the facts stated therein.

(4) A person who contravenes *subsection (1), (3A),* *(5)* or *(5A)* shall be guilty of an offence.

(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 an agent of it has committed an indictable offence under the Companies Acts (other than an indictable offence under section 125(2) or 127(12) 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.

(5A) Where the auditors of a company notify the Director of any matter pursuant to subsection (5), they shall, in addition to performing their obligations under that subsection, if requested by the Director—

(a) furnish the Director with such further information in their possession or control relating to the matter as the Director may require, including further information relating to the details of the grounds on which they formed the opinion referred to in that subsection,

(b) give the Director such access to books and documents in their possession or control relating to the matter as the Director may require, and

(c) give the Director such access to facilities for the taking of copies of or extracts from those books and documents as the Director may require.

(5B) Nothing in this section compels the disclosure by any person of any information that the person would be entitled to refuse to produce on the grounds of legal professional privilege or authorises the inspection or copying of any document containing such information that is in the person's possession.

(6) No professional or legal duty to which an auditor is subject by virtue of his appointment as an auditor of a company shall be regarded as contravened by, and no liability to the company, its shareholders, creditors or other interested parties shall attach to, an auditor, by reason of his compliance with an obligation imposed on him by or under this section.

Appendix 2

Legal Professional Privilege

Section 194(5B) of the 1990 Act states:

> *'Nothing in this section compels the disclosure by any person of any information that the person would be entitled to refuse to produce on the grounds of legal professional privilege or authorises the inspection or copying of any document containing such information that is in the person's possession.'*

The issue of whether information or documents attract legal professional privilege will need to be considered carefully. The question is one of law which, in appropriate circumstances, may fall to be determined by the Courts. **Accordingly, auditors seeking to limit disclosure on the basis of legal professional privilege are advised to consider taking legal advice in advance**.

A brief explanation of legal privilege and the circumstances in which it may apply are set out below. Such situations are likely to be rare. For example, it is unlikely that the audit work carried out and documented by the auditor which resulted in the identification of a reportable matter will be privileged. This is because such audit work would not have been in contemplation of litigation; identification of a reportable matter is incidental to the audit. Nor will it apply to other non-audit documentation prepared by the audit firm in advance of the formation of an opinion that a report should be made to the Director and which relates to the subject matter of that report.

Legal professional privilege exists in two forms – legal advice privilege and litigation privilege.

Legal Advice Privilege

Legal advice privilege prevents the disclosure of communications between a lawyer and a client where such communications are made for the purpose of obtaining legal advice. It is not necessary for litigation to be pending or contemplated for this to apply. However, for legal advice privilege to apply, the advice must come from a professionally-qualified lawyer (solicitor or barrister). Advice from an auditor or tax advisor to a client is not subject to privilege.

The subject matter of the document must be legal advice rather than legal assistance (e.g., company secretarial services).

As noted above, the circumstances in which this form of legal professional privilege will apply to an auditor are likely to be rare.

Litigation Privilege

Litigation privilege prevents the disclosure of communications between the client and his lawyer or either the client or his lawyer and a third party, such as, in this case, the auditor.

For litigation privilege to apply, the Courts have set out certain criteria:

- litigation must be pending, contemplated or reasonably apprehended[11];
- the dominant purpose for the creation of the document must have been that of pending/ contemplated or reasonably apprehended litigation - there may be more than one purpose behind the preparation of the document;
- documents in existence prior to litigation being contemplated will not be privileged.

It is important to note that legal professional privilege "belongs" to the client who has sought the legal advice or is party to the relevant litigation. It is for that client to decide whether to assert the privilege or, alternatively, whether he/she wishes to waive it.

Where the auditor or his/her firm has sought legal advice (including from the audit firm's professionally-qualified in-house lawyers), such advice clearly attracts legal professional privilege, and it is for the auditor to decide whether or not to assert the privilege. The same situation applies where the auditor or his/her firm is a party to pending or contemplated litigation and documents have been created for the dominant purpose of that litigation.

Where an auditor or his/her firm is in possession of information or documents over which the audit client enjoys legal professional privilege, the situation is somewhat more complicated. Legal professional privilege is concerned with protecting confidential communications, and, accordingly, if a client has opted to substantially publicise those communications the privilege may be lost or may be taken to have been waived. However, it is thought that confidential disclosure by a company to its statutory auditors of material over which it (the company) enjoys legal professional privilege will not ordinarily give rise to a loss or waiver of the company's privilege – certainly in cases where the auditor, as such, shares a common interest in the communications with the company.

11 These terms have received judicial consideration and should be read in light of the relevant case law.