

## **Corporate Health Check**

### **Ten Steps that every Company Director should take to help secure their Compliance with Company Law**

The advent of the Office of the Director of Corporate Enforcement (ODCE) has resulted in a greater awareness of the necessity to comply with the Companies Acts. Many company directors are under the impression that compliance with company law is a technical and difficult task which must be delegated to the company's professional advisors. However, compliance for small and medium sized firms is relatively straightforward. Even where directors decide to delegate the relevant work to their professional advisers, directors should ensure that this work is discharged on their behalf in full and on time.

The following ten steps may help directors to check on their compliance with a number of key obligations in company law.

#### **1 Who is entitled to act as a director of a company?**

Most people may act as a company director unless they are prohibited from doing so. In general, a person is not entitled to be a director:

- if an order for disqualification has been made by the High Court prohibiting their acting as a director;
- if a declaration of restriction has been made by the High Court against them and the company is not adequately capitalised. In the case of a public limited company, the paid up capital investment in the company is €317,435 in cash and in the case of any other company, the required sum is €63,487 in cash;
- if the person is an undischarged bankrupt (in any country); or
- if the person has been convicted by a judge and jury of a major offence relating to a company or involving fraud or dishonesty within the last five years.

Even if a person is entitled to be a company director, they must be validly appointed to act as a director. Normally, the shareholders at the company's Annual General Meeting (AGM) will appoint the company's directors, although certain companies have different provisions. If in doubt, have a look at the company's constitution, i.e., its Memorandum and Articles of Association. A copy will be available from the Company Secretary or from the Companies Registration Office ([www.cro.ie](http://www.cro.ie)).

In any event, make sure that the proper procedures for the appointment of directors have been executed and are documented in full.

The ODCE has already successfully convicted persons who were either undischarged bankrupts or disqualified.

## **2 Are the details relating to the company on the Register of Companies correct and up to date?**

The Companies Registration Office maintains a Register of Companies (available at [www.cro.ie](http://www.cro.ie)) which gives the public certain basic information about Irish companies. It helps company directors to 'know their customer' and should be regularly consulted to check out the state of affairs of a client company and thereby help to evaluate its risk profile.

These basic details include:

- the registered office of the company;
- the name and addresses of the current and former company directors and secretary;
- details of all of the charges (mortgages) held over the company's property;
- the company's Annual Return; and
- a list (and details) of all of the documents submitted by the company to the Companies Registration Office.

A failure by a company or the company secretary to furnish promptly details of changes in the company's registered office or the particulars of the company's directors or other officers can give rise practical difficulties. For example, the failure to update a change of registered office or the names and addresses of the directors has resulted in directors not receiving important statutory documentation, e.g., warning strike-off notices. In addition, the provision of inaccurate or incomplete information, e.g., directors failing to disclose all directorships, exposes directors to possible prosecution.

The company's Annual Return is another critical document which summarises the current status of the company. This Return includes details of the company's directors and shareholders, its financial statements and any audited accounts. Every company must submit an annual return within 28 days of the annual return date (ARD) which is specified in the Register of Companies. This date is normally close to the company's AGM.

In addition to it being an offence to fail to file an Annual Return on time, severe administrative penalties of up to approximately €1,200 per annual return can be imposed by the CRO. Most importantly, the failure to submit an annual return may result in the CRO striking the company off the Register which means that the company no longer legally exists.

Where a company is struck off, the directors may be personally liable for the company's operations during the period of strike-off. Moreover, the assets of the company vest in the Minister for Finance. While it is possible to restore a company to the Register, it can be a time-consuming and expensive process particularly if it involves an application to the High Court.

The ODCE has secured convictions against a company director for the provision of false information to the CRO. It has also recently secured the disqualification of a company director for two years arising from the company being dissolved following strike-off. Such potentially serious consequences for companies, company directors and their business interests should be avoided at all costs by ensuring that all filing obligations are dealt with promptly.

### **3 What books and records must be maintained by the company?**

The following are required to be kept by all companies:

- a) Register of Directors and Secretary;
- b) Register of Directors' and Secretary's interests (in the company or related companies);
- c) Register of Members;
- d) Register of (Debentures) Mortgages;
- e) Register of Directors' employment contracts with the company and
- f) minutes of general meetings of members, the board and board sub-committees.

As regards the Registers at (a)-(e) above, these are normally provided by the company formation agents and require a minimum amount of maintenance which does not require specialist knowledge. For example, the Register of Directors and Secretaries merely records the names and addresses of the directors and the secretary. An entry in the Register of Members only requires the insertion of the name and address of the shareholder and the numbers of shares which have been transferred to, or from, him or her. Yet this is important work, because any failure to record properly the information may result in the member not being notified of general meetings or their not being paid any dividend on their shareholding.

A majority of companies fail to maintain the minutes of directors' meetings despite the simplicity of such requirement. In order to record minutes of such meetings, a person merely has to note briefly the issues which arose at the meeting and the decisions which were taken in relation to such issues. This is of great assistance to directors themselves in providing evidence of major decisions and to professional persons in any review of the company's business which might be undertaken.

The Companies Acts also require that such books and records be kept at the registered office of the company (unless work is currently undertaken on these books).

All members of the company are entitled to inspect these books. Failure to maintain these records or to permit inspection of them is an offence by the company and its officers.

#### **4 What financial information should be available regarding the company?**

The company is obliged to maintain at its registered office books of account which:

- correctly record and explain the company's transactions;
- at any time enable the financial position of the company to be determined with accuracy;
- enable the directors to ensure that the financial statements comply with the requirements of the Companies Acts; and
- allow the financial statements to be readily and properly audited.

Directors have an entitlement to inspect the books of account.

Whilst there is no statutory requirement to do so, the company (if it does not have the bookkeeping experience in house) should consider employing an accountant or a bookkeeper to maintain the books of account.

Failure to maintain such books of account is an offence and may also result in personal liability being imposed on directors in the event of the company becoming insolvent. The ODCE has secured numerous convictions against companies and their directors in the last three years for failing to keep proper books of account.

An audit is an independent financial assessment of the books of account of the company. An audit opinion indicates if the company has maintained proper books of account and if the financial statements give a true and fair view of the state of affairs of the company. An auditor is also obliged to report to the ODCE any serious company law offences which he has identified during the course of the audit.

In general, a company is obliged to have the books of account audited by an external auditor at the end of the financial year. However, a large number of smaller companies are now exempt from the requirement to have the books of account audited. Qualifying companies must satisfy at least two of the following three conditions:

- have a turnover of less than €1,500,000 per annum;

- have a balance sheet total which does not exceed €1,904,607; and
- have an average number of employees which does not exceed 50.

There are, in addition, a number of additional pre-conditions, one of which is that the company must file an up-to-date Annual Return and have filed its previous Annual Return on time.

## **5 Must the company hold an Annual General Meeting (AGM)?**

AGMs are mandatory and must be held in each calendar year with not more than 15 months between AGMs. In general, an AGM must be held within the State.

Prior to an AGM, the board of directors must provide the members of the company with the required notice (normally 21 days) of the Meeting and of any resolutions which it is proposed to put to the Meeting. The members should also receive a copy of the company's annual financial statements, including the Directors' Report and any Auditor's Report.

An AGM is required to approve the company's financial statements and associated Directors' Report. It is also entitled to appoint the officers of the company, including its auditors, and to pass resolutions and/or special resolutions.

A failure by companies to hold AGMs within the prescribed time limits, to serve notices on the members entitled to attend or to hold the Meeting in the proper manner may constitute an offence under the Companies Acts if it potentially deprives members or other parties of their statutory entitlements.

## **6 What are the duties of the board of directors and of individual directors?**

The main function of the board of directors is to supervise the management of the company and to set its policy and direction. The failure of the board to maintain control over the affairs of the company can contribute to company failure.

There is no prescribed agenda or timing of board meetings. However, a board should meet regularly to review the company's state of affairs.

Mention has already been made earlier of a number of the statutory obligations which apply to all directors. Apart from these, a director has a number of general duties including:

- to use their skills and a reasonable level of care in the performance of their duties;
- to attend meetings regularly (but not necessarily every time);
- to act in good faith in the company's best interest;

- to exercise powers for a proper purpose, namely for the benefit of the members or the purposes for which the company was set up; and
- to avoid either actual or potential conflicts of interest between their personal interests and those of the company.

## **7 What personal entitlement do directors have to company property?**

One of the most important principles which a company director must learn is that a company's assets is not their property (even though they may be the sole or primary shareholder). This is because there will often be many other parties with a financial interest in the business, including in particular the company's employees and its creditors. Therefore, company directors should not treat company assets as belonging to them unless the property has been properly assigned to them.

The most appropriate methods by which a director can obtain value from the company are as follows:

- **Dividend**  
A dividend is the money which shareholders receive as earnings from their investment in the company. A dividend can only be declared at the AGM and must only be paid out of the profits which have been accumulated by the company. All eligible shareholders must receive the dividend.
- **Contract of Employment**  
A director can be an employee of the company and may take a salary in line with that contract. However, this salary must be disclosed in the annual accounts of the company.
- **Directors' Loans**  
There is general prohibition on directors drawing down funds from the company for personal purposes. However, it is permitted in certain defined circumstances, and where it occurs, the funds will often be treated as a company loan to the director. One of the permitted circumstances is where the aggregate value of loans to directors does not exceed 10% of the company's 'relevant assets'. Further information on this term and on the other exceptions is available from the ODCE at [www.odce.ie](http://www.odce.ie). A breach of the permitted circumstances may constitute an offence by the company's directors.

## **8 What happens if the company is in financial trouble?**

If a company cannot pay its debts as they fall due, then the company is insolvent. If the company continues to operate while in this situation and in disregard of the interests of its creditors and other stakeholders, the directors may be held personally liable for the consequences, including any debts which the company may incur while trading in an insolvent manner. The director will also be at the risk of prosecution, restriction or disqualification if they fail to act within the law and discharge their duties in a responsible manner. Some 300 company directors have been restricted in

the last two years for acting either dishonestly or irresponsibly in the conduct of an insolvent company.

**9 Where can further information on company law compliance issues be obtained?**

The ODCE has produced Information Books on the duties and rights of directors, companies and other company stakeholders, including members/shareholders and company creditors. This material has been supplemented by detailed guidance in specific areas, such as directors' loans. Guidance is also being developed on the new requirement that directors will report annually on their company's compliance with tax law, company law and certain other enactments having a potentially material effect on the company's financial statements. All of this documentation and information is available on the ODCE website at [www.odce.ie](http://www.odce.ie). Alternatively, printed versions of these booklets may be obtained upon request by e-mailing [info@odce.ie](mailto:info@odce.ie) or via the lo-call telephone number at 1890-315015.

Information on the filing obligations of companies and their officers is available from the Companies Registration Office at [www.cro.ie](http://www.cro.ie) and from their lo-call telephone number at 1890-220226.

**10 When should professional advice be sought?**

Some of the provisions of company law can be quite technical. In addition, directors will face important or difficult issues during the course of a company's life. General information such as that available from the ODCE or CRO should always be supplemented by advice from the company's professional advisers, where directors are in any doubt about the effect of a particular legal provision or the consequences of particular events or decisions or where directors require specialist assistance to undertake certain tasks relating to the affairs of the company.

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The contents of this article are a general illustration of company law only and no liability howsoever arising is accepted for the contents thereof. Independent professional advice should be sought where appropriate.