

PROMOTING A GREATER UNDERSTANDING OF AFFECTED PARTIES' RIGHTS AND DUTIES UNDER COMPANY LAW

02.

CHAPTER 2

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Introduction

This Chapter provides details of the principal strategies pursued, and activities undertaken, by the Office during the year under review in the furtherance of the above stated goal. In summary, those strategies and activities included:

- the development and promulgation of publications and other guidance material;
- engaging in a range of outreach activities, including the delivery of presentations, attendance at seminars and exhibitions and dealing with general company law enquiries from members of the public;
- advocating legislative and policy enhancements; and
- managing and developing relationships with external stakeholders.

Publications and outreach activities

Publications

The Office, from time to time, develops and publishes information and guidance for stakeholders' benefit. The publication of such material is typically on foot of the enactment of a new piece of legislation or in response to issues identified through other aspects of the Office's work (e.g., on aspects of company law that appear to be giving rise to significant levels of non-compliance). During the year, the Office issued 10 new publications (2011: 11). Details of those publications are set out in the Table below.

Table 4
Publications issued - 2012⁹

Date Issued	Publication
January 2012	Annual Review: 2011
January 2012	Transactions Involving Directors – A Quick Guide
April 2012	Company Law Handbook on Residential Property Owners' Management Companies – Handbook (2nd Edition)
April 2012	Management Companies, A Property Owner's Guide To Company Law
April 2012	Section 56 Reports – Information Notice
May 2012	Auditor Reporting – What Happens Next?
June 2012	ODCE Annual Report: 2011
August 2012	Companies (Amendment) Act 2012 – Information Notice
September 2012	SI ¹⁰ 304 of 2012 – Information Notice
September 2012	SI 308 of 2012 – Information Notice

⁹ All publications are available at www.odce.ie

¹⁰ Statutory Instrument

A second edition of the Company Law Handbook on Residential Property Owners' Management Companies was issued in April 2012. This new edition reflected, in the main, the impact of the Multi-Unit Developments Act 2011, as well as various other legislative developments and amendments that had occurred since the first edition was published in 2008.

The Office issued a further publication in its range of Quick Guides in January 2012. The publication dealt with Transactions Involving Directors, a topic that continues to be amongst the most frequently reported issues by auditors. At year end, a number of further Quick Guides were in the process of being finalised. All such guidance is produced in conjunction with the National Adult Literacy Agency ("NALA") and, as such, has obtained the Plain English stamp, which signifies a clear, concise and simple writing style allowing the reader to easily understand the message.

As is elaborated upon in Chapter 3 of this Report, auditors are an important source of statutory reports to the Office. That being the case, the Office engages with the profession on an ongoing basis. In that context, a number of documents designed to assist auditors in complying with their statutory reporting obligations have been published. In May 2012, the Office issued a document entitled "*Auditor Reporting: What Happens Next?*", which outlines the Office's internal process following receipt of a report. The Recognised Accountancy Bodies ("RAB")¹¹ assisted the Office in drafting this publication and in subsequently drawing it to auditors' attention.

In April 2012, the Office published details of those instances in which decisions had been taken to relieve liquidators, either permanently or temporarily, of their obligation to take restriction proceedings against the directors of named insolvent companies. Such decisions were taken following review of liquidators' reports as required under section 56 of the CLEA. Further detail on the section 56 process is set out in Chapter 3 of this Report.

From time to time the Office publishes Information Notices on newly enacted legislation for stakeholders' benefit. In that context, the Office published three such documents during the year, i.e. on the subjects of:

- the Companies (Amendment) Act 2012, which amended the Regulations that allow certain parent companies to use US GAAP¹² by extending the timeframe to 31 December, 2020;
- SI 304 of 2012, which increased the Balance Sheet and turnover thresholds allowing private companies to avail of certain disclosure exemptions in their financial statements; and
- SI 308 of 2012, which increased the Balance Sheet and turnover thresholds allowing private companies to avail of audit exemption.

In addition to the foregoing, the Office issued in excess of 20,000 copies of its various publications during 2012. In particular, the Office's updated Information Books proved popular, as did the Office's expanding range of Quick Guides. By agreement with the Office, the Companies Registration Office ("CRO") issued approximately half of these documents to persons registering new companies¹³. The remainder were, in the main, issued in response to public demand, either at events, exhibitions and presentations or as a result of persons contacting the Office directly.

¹¹ There are six RABs, i.e. the:

- Association of Chartered Certified Accountants (ACCA);
- Institute of Certified Public Accountants in Ireland (ICPAI);
- Institute of Chartered Accountants in England & Wales (ICAEW);
- Institute of Chartered Accountants in Ireland (ICAI);
- Institute of Chartered Accountants of Scotland (ICAS); and
- Institute of Incorporated Public Accountants (IIPA).

¹² Generally Accepted Accounting Principles

¹³ The CRO typically issues the ODCE Quick Guide on company directors as part of its pack as issued to newly incorporated companies.

Seminars and exhibitions

A key element of the Office's advocacy strategy is its outreach programme. This consists of, amongst other things, the delivery of presentations and speeches to stakeholder groups, as well as attendance at exhibitions and events where the audience is likely to include one or more elements of the Office's target audience. The Office has identified certain constituencies as being amongst its target audience, including:

- persons considering incorporation or having recently incorporated businesses;
- professionals engaged in the provision of advice to companies and company directors, who are well placed to relay the compliance message to clients and so considerably expand the reach of the Office;
- students currently enrolled in business programmes at undergraduate and postgraduate level, many of whom will ultimately become directors of companies or professional advisors themselves; and
- the community and voluntary sectors, who by their nature tend to lack a knowledge of company law and, as a result, tend to benefit from guidance.

During the year, Office staff delivered 47 presentations (2011: 53) to a combined audience of almost 1,700 people. Of particular note was that, in the latter part of the year, the Office engaged with a number of City and County Councils for the purpose of outlining the company law and related issues that can arise in the context of the activities they undertake and services they provide respectively through the medium of companies. This engagement is expected to continue into 2013. During the year, the Office was also represented at 16 exhibitions and events (2011: 15). Details of the presentations delivered and exhibitions attended respectively during the year are set out at Appendix 2 to this Report.

Advocating legislative and policy enhancements

Given its mandate of promoting compliance, and enforcing non-compliance, with company law, the Office is well placed to offer an informed perspective on policy discussions and debates that take place at national and EU level regarding company law and associated topics. In that context, the Office made submissions in response to a number of policy proposals during the year. Further details are set out below.

The Companies Bill

During the year, the Department continued its work on the finalisation of the Bill (the primary purpose of which is to consolidate the current body of company law, which, at present, is contained in 16 Acts of the Oireachtas¹⁴ as well as numerous SIs and Regulations). The Bill does, however, also include some proposed amendments and additions to company law as it currently stands.

The second part (or Pillar B) of the draft Bill was published on the Department's website in May 2012, and, subsequently, Departmental staff engaged in a review of the entirety of the draft legislation in order to facilitate consideration of any issues raised by stakeholders with the draft as published, as well as to reflect any legislative changes in the interim.

The Office engaged, in particular, on suggested revisions to Part 2 of the Bill, which deals with the conversion of private companies to public limited companies, as well as on Part 22, which deals with external companies¹⁵. In addition to these specific matters, the Office also communicated its observations to the Department on those aspects of the Bill dealing with the proposed registration of liquidators. The final draft of the Bill was published by the Department in December 2012¹⁶.

¹⁴ Collective term for the Upper and Lower Houses of Parliament

¹⁵ External companies are a new concept which will include what are currently defined in the Companies Acts as branches as well as foreign companies establishing a place of business in the State.

¹⁶ The Bill can be accessed at <http://www.oireachtas.ie/parliament/oireachtasbusiness/billslegislation/bills/>

EU Commission proposal for a new Accounting Directive

In January 2012, the EU Commission issued a paper proposing certain revisions to two EU Accounting Directives¹⁷. In its response, the ODCE issued a general caution in the context of seeking to use legislative instruments such as Directives to deal with accountancy issues, as, by their nature, such tools are slow to develop and are relatively inflexible should there emerge a need to adapt or change them quickly.

That said, the Office was broadly supportive of proposals designed to alleviate the administrative burden on small businesses, such as the extension of audit exemption to small groups of companies. However, due to their size and potential impact, the Office suggested it would be inappropriate to extend this exemption to medium sized groups of companies. The Office also made suggestions of a technical nature as to how any proposals would, of necessity, have to interact with current and proposed future accounting standards.

Draft Regulation on proposed requirements regarding statutory audit of Public Interest Entities ("PIEs") & Draft Directive on statutory audits of annual and consolidated accounts

During the year, and having engaged in a major consultative exercise, the EU Commission issued a package (comprising of a draft Regulation and Directive respectively) of proposed reforms to statutory audit and the audit market within the EU. Whilst the Office supported many of the Commission's proposed reforms, it did express reservations regarding certain of the proposals. Amongst the proposals supported by the Office were:

- the introduction of a standard document retention requirement, which the Office suggested should be for a period of six years rather than the proposed five; and
- the assignment of quality assurance in respect of auditors of PIEs to the relevant Competent Authority.

The Office expressed concerns as regards proposals relating to:

- the separation of audit and non-audit activities, which may prove impossible to implement on an EU only basis and may act as a disincentive to new entrants; and
- the proposal for a lesser audit for smaller and medium sized entities, which the Office felt may cause to dilute understanding of what an audit is, and cause confusion as to the work of the auditor.

European Commission Consultation on the future of EU company law

In its response to this broadly themed document, the Office stated its belief that, rather than engage in further work on EU defined corporate structures, the EU Commission should focus on setting out broad parameters to apply EU-wide while allowing sufficient flexibility at Member State level. In relation to a company transferring its registered office, the Office advocated that no such transfers should be allowed where a company has been placed in liquidation or is the subject of insolvency related proceedings.

Legal Services Regulation Bill

In noting the passage of this Bill through its Second Stage in Dáil Éireann¹⁸, the Office expressed the opinion that the Bill, as drafted, would not adequately deal with the issue of the control of legal costs, which are a significant matter for the Office. In particular, the Office noted that proposals made by working groups in 2005 and 2006 respectively to the effect that:

- costs should be primarily assessed by reference to work actually and appropriately done; and
- responsibility for taxing costs should be assigned to an Office separate from that which is responsible for regulatory matters,

had not been reflected in the Bill.

¹⁷ Directives 78/660/EEC and 83/349/EEC

¹⁸ Lower House of Parliament

Proposed extension of Freedom of Information Acts

As currently enacted, the combined effect of Freedom of Information ("FoI") and company law legislation is such that only the administrative aspects of the Office's operations are subject to FoI. Government policy is that all State Agencies and Offices should be fully subject to FoI and, in that context, at year end the Office was liaising with the Department and the Department of Public Expenditure & Reform respectively.

Other consultations

During the year, the Office also furnished observations on a number of other consultations, including the Law Reform Commission's call for submissions regarding the content of its new work programme. The Office's response to that invitation was, in essence, a recitation of the document previously submitted to the Department of Justice & Law Reform in response to its discussion document entitled "*Organised and White Collar Crime*"¹⁹.

Contribution to Department responses

In addition to issuing a number of responses in its own right, the Office also contributed material to the Department to assist it in formulating its responses on a range of matters, including the EU Draft Prospectus Directive and the Criminal Justice (Corruption) Bill.

Managing and developing relationships with external stakeholders

In furtherance of its statutory objectives and associated goals, the Office seeks to develop and maintain strong and effective relationships with a range of key stakeholders. In addition to the general public, the Office's key stakeholders include the Oireachtas, the Minister, the Department, other statutory/regulatory bodies and those providing professional services to companies and company directors and officers. The Office's interactions during the year with certain of its key stakeholders are summarised below.

Members of the Oireachtas

The Office, from time to time, receives communications from members of the Oireachtas. Typically, these communications constitute expressions of concern as to whether the Companies Acts are being breached by particular parties or relate to cases under review. Whilst the Office is severely constrained in the extent to which it can respond to such communications by virtue of its statutory confidentiality obligations, it endeavours to provide whatever assistance it can to Deputies²⁰ and Senators.

Department of Jobs, Enterprise & Innovation

Office staff continued to liaise with colleagues in the Department throughout the year on matters of mutual interest. The Office has been afforded representation at Departmental management meetings and, outside of those formal structures, there are regular contacts as the need arises.

CRO

As the public repository of information on companies and company officers, the CRO plays a critically important role in supporting the Office in its work. In addition to meeting regularly on matters of mutual interest, CRO staff regularly supply evidence in ODCE proceedings and, where identified, of prima facie breaches of the Companies Acts.

Garda Bureau of Fraud Investigation ("GBFI")

As referred to in Chapter 1 of this Report, the Office's staff complement includes a number of Gardaí. These Gardaí are on secondment from the GBFI. The Office's close relationship with

¹⁹ That document was discussed at length in the 2010 Annual Report, which is available at www.odce.ie

²⁰ Members of the lower House of Parliament

An Garda Síochána, and GBFI in particular, is critical to its criminal enforcement work. In that context, the Office meets with GBFI management on a regular basis on matters of mutual interest.

Irish Auditing and Accounting Supervisory Authority ("IAASA")

In accordance with the provisions of the Companies (Auditing and Accounting) Act 2003 ("2003 Act"), the Director is a member of IAASA and has the right to nominate a member to its Board of Directors. The former Director was, until the time of the announcement of his proposed retirement, a member of the Board. At that time, the former Director elected to step down from the Board and to nominate Mr. Conor O'Mahony, the Office's Head of Insolvency & Corporate Services, to the Board.

Whilst the current Director had, upon his appointment, intended to join the Board, the composition of the Board at that time was such that, by virtue of the provisions of the 2003 Act (which limit the number of accountants that may sit on the Board at any given time), he was precluded from doing so. Under the circumstances, and at the Director's request, Mr. O'Mahony indicated his willingness to continue to serve on the Board.

During the year, the IAASA Board met on 9 occasions. The ODCE nominee attended 8 of those meetings. IAASA's 2012 Annual Report will be available on its website²¹ once it has been laid before the Oireachtas by the Minister.

In addition to this statutory relationship as outlined above, the Office engaged regularly with IAASA during the year on matters of mutual interest.

Company Law Review Group ("CLRG")

The CLRG is a statutorily established advisory body to the Minister on matters relating to company law. The Director is a member of the CLRG and the Office is represented at both plenary meetings and at meetings of Committees whose work is pertinent to its remit. During the year, the CLRG completed its 2010-2012 work programme and commenced work on a new programme²². The Office contributed to, amongst others, the following issues as considered by the CLRG:

The loss of fiduciary taxes arising from the abuse of limited liability

Having considered the matter, the CLRG recommended increasing the current minimum capital requirements applying to companies having directors that have been the subject of restriction orders but considered that the practical implications of an amendment to company law requiring directors to have their tax affairs in order would outweigh the benefits and would give rise to an unnecessary administrative burden.

The adoption of the UNCITRAL²³ model on cross border insolvency

The CLRG engaged in a consultation process with interested parties, which gave rise to some technical concerns being raised which were judged to require further examination. Accordingly, the Group asked the Minister to extend consideration of this issue into the CLRG's next work programme.

The representation of a company before the courts

Having become aware of a case in which this issue had been referred to the Supreme Court, the Group recommended that consideration of this issue be included in its next work programme by the Minister.

Certain offences under the Companies Acts

The CLRG developed criteria for the assessment (and classification by reference to the four grades of penalties as proposed in the Companies Bill) of new offences created under future company law²⁴.

²¹ www.iaasa.ie

²² A copy of the CLRG's 2011 Annual Report is available at www.clrg.org

²³ United Nations Commission on International Trade Law

²⁴ These criteria are set out on page 60 of the CLRG's 2011 Annual Report, which is available at www.clrg.org

Suitability of examinership for small companies

The CLRG also commenced work on its 2012-14 work programme during the year and, in that context, the Office contributed to the work of a Committee charged with examining the possibility of introducing less costly and administratively onerous examinership arrangements for small companies. Specifically, the Committee considered the suitability of examinership for use by small companies and recommended that small companies should be permitted to apply directly to the Circuit Court rather than the High Court for examinership. The Committee also outlined a simplified, non-judicial, administrative procedure which could be considered for adoption, subject to further analysis and deliberation on the policy issues involved and the identification of an appropriate Agency to administer the procedure. It also noted that the recently established Insolvency Service might be a suitable Agency in this regard.

Central Bank

The ODCE and the Central Bank have in place a long standing Memorandum of Understanding which, based on their grounding legislation, allows each body to refer information to the other where they are satisfied that such information is relevant to their counterpart's remit. This has proven particularly useful in the context of the Office's ongoing investigation into certain events at the former Anglo Irish Bank Corporation. In addition, formal communications in respect of five separate entities took place during 2012.

During 2012 the Central Bank hosted two meetings of a Regulators' Forum, where a range of senior officials from various regulatory bodies met to discuss issues of mutual interest. Office staff attended both meetings and it is anticipated that the forum will continue to meet in the future.

Office of the Revenue Commissioners

The Revenue Commissioners are an important partner of the Office in the furtherance of its work, in particular in respect of insolvency related matters. In that context, the two bodies met on a number of occasions during the year. Moreover, the two bodies shared information in respect of 10 separate matters (2011:30). However, the effectiveness of these information sharing arrangements continues to be impacted adversely to a significant extent by a provision included in the Finance Act 2011, which limits the ability of the Office to obtain (and where obtained, use) certain information from the Revenue Commissioners. Whilst the Office has, through interactions with the relevant parties, made efforts have this issue remedied, the problem, which per the Office's understanding requires a legislative solution, continued to prevail at year end.

Accountancy profession

The accountancy profession plays an important role in assisting the work of the Office, through both the mandatory reporting obligation for auditors to report suspected indictable offences under the Companies Acts and the wider support for the Office's compliance message which its members can deliver to their clients. As such, the Office seeks to work closely with the accountancy bodies to support them in ensuring that their members are fully informed of their statutory reporting obligations and to apprise them of the assistance that the Office can provide to company directors and officers.

Office representatives held two formal meetings with senior members of the accountancy bodies' management during the year. In addition to these meetings, the Office also worked with the profession through a Technical Liaison Group, where matters of a more technical nature are discussed. In May 2012, this Group concluded work on a publication designed to assist auditors in understanding the Office's processes upon receipt of an indictable offence report²⁵.

²⁵ "Auditor Reporting: What Happens Next?" published in May 2012, available at www.odce.ie

Irish Stock Exchange

The Office held one formal meeting with senior staff of the Irish Stock Exchange during 2012. Amongst the matters discussed was the formal transfer of certain regulatory duties from the Stock Exchange to the Central Bank.

Financial Reporting Council – Irish Consultative Committee

This Committee, formerly known as the Auditing Practices Board – Irish Consultative Committee, is an advisory group which responds, and provides input, to proposals from the Financial Reporting Council on auditing matters from an Irish perspective. The Group convened once during 2012 to discuss proposals aimed at improving the content of auditors' reports on financial statements.

International Association of Insolvency Regulators ("IAIR")

The IAIR is an international body that brings together the collective experiences and expertise of national insolvency regulators from 26 jurisdictions around the world. The IAIR, of which the Office has been a member since 2003, is a valuable forum for the promotion of liaison and co-operation between its members and for sharing information on areas of common interest and best practice.

Other interested parties

In addition to the stakeholder groups referred to above, the Office also met with and/or worked with a range of other stakeholder groups and interested parties during 2012, including the Irish Small & Medium Enterprises Association, the Small Firms' Association and the Institute of Directors.

Media

The Office typically deals with hundreds of media queries annually. Whilst the Office is mindful of the important role the media can play in informing the debate on company law, compliance and governance issues generally, and strives where possible to assist the media in dealing with general queries, it must equally take great care in how it does so. The Office is precluded under governing legislation from making any public comment on the conduct of investigations, except in respect of information which has already made its way into the public domain. In addition, the Office is mindful of the rights of individuals and other persons coming before the Courts, and, as such, it does not issue progress reports or any other information on its enforcement activity if it could potentially prejudice any future legal actions.

Where appropriate, members of Office staff contribute articles to the media and relevant publications. Office staff wrote, or contributed to, articles in the Sunday Business Post and Accountancy Plus magazine during 2012.