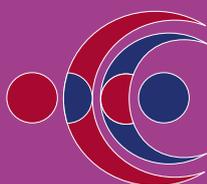


The Principal Duties and Powers of

# Auditors

under the Companies Act



Oifig an Stiúirthóra um  
Fhorfheidhmiú Corparáideach

Office of the Director  
of Corporate Enforcement





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## 1.0 Introduction

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The Companies Act 2014 brought about some of the most significant changes in company law in fifty years. It created new forms of company, and introduced a number of changes to the roles of various parties in company law.

The Office of the Director of Corporate Enforcement (ODCE) in furtherance of its remit to encourage compliance with company law, has historically issued a range of Information Books outlining the main roles and responsibilities of some of the key parties in company law, to assist non-professionals who aspire to be better informed about their rights and obligations under the law.

These Information Books were first issued in November 2001, and the current edition represents the third major rewrite of these publications since their first publication. The current edition reflects the law as at the passing of the Companies Act 2014. The books are on the following topics:

**Information Book 1 – Companies**

**Information Book 2 – Company Directors**

**Information Book 3 – Company Secretaries**

**Information Book 4 – Members and Shareholders**

**Information Book 5 – Auditors**

**Information Book 6 – Creditors**

**Information Book 7 – Liquidators, Receivers and Examiners**

In addition to information on the relevant duties and powers, each book also contains information on the penalties for failure to comply with the Companies Act.

Each book has been prepared for use by a non-professional audience in order to make the main requirements of company law more easily understandable.

The Director of Corporate Enforcement considers it important that individuals who take the benefits and privileges of incorporation should be aware of the corresponding duties and responsibilities. These Information Books are designed to increase the awareness of individuals in relation to those duties and responsibilities.

The Director wishes to make clear that this guidance cannot be construed as a definitive legal interpretation of the relevant provisions. Moreover, it must be acknowledged that the law is open to different interpretations. Accordingly, readers should be aware that there are uncertainties in how the Courts will interpret the law, particularly when the law is applied to the specific circumstances of specific companies and individuals.

It is important to note that when readers have a doubt as to their legal obligations or rights, they should seek independent professional legal or accountancy advice as appropriate.

As changes are made to company law in the future, the Director intends to keep this guidance up to date. He also welcomes comment on its content, so that future editions can remain as informative as possible.

**Office of the Director of Corporate Enforcement  
May 2015**



## 2.0 Principal Duties and Powers of Auditors

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### 2.1 Companies' and Directors' Responsibilities for the Preparation of Annual Financial Statements

Before examining auditors' responsibilities and duties, it is helpful to first revisit companies' and company directors' responsibilities with regard to the preparation of annual financial statements.

Every company is obliged to keep or cause to be kept adequate accounting records, which correctly record and explain all the company's transactions<sup>1</sup>. From the accounting records and other relevant information a company is required to prepare statutory annual financial statements<sup>2</sup>. The contents of the annual financial statements are set out in Information Book 1 – Companies at section 2.10.2. The directors are obliged to arrange for an audit by a statutory auditor<sup>3</sup> of the annual financial statements unless the company is entitled to and chooses to avail itself of, audit exemption<sup>4</sup>.

It is the directors' responsibility to ensure that the financial statements give a true and fair view of the assets, liabilities and financial position of the company (including profit or loss) at the end of the financial year<sup>5</sup>.

### 2.2 What is an Auditor

An auditor (defined as a statutory auditor under the Companies Act) is an independent professional person qualified to perform an audit. In practice, a firm of auditors will usually be appointed to act as auditors to a company. Auditors are primarily regulated by their professional bodies, with oversight by the Irish Auditing and Accounting Supervisory Authority (IAASA).

A "statutory auditor" under the Companies Act, means an individual or a firm (within the meaning of those Regulations) that stands approved as a statutory auditor or statutory audit firm, as the case may be, under the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220 of 2010).

A list of auditors and audit firms entitled to act as auditors is available on the website of the Companies Registration Office, [www.cro.ie](http://www.cro.ie).

### 2.3 What is an Audit

An audit involves obtaining evidence about the amounts and disclosures in the financial statements sufficient to give reasonable assurance that the financial statements are free from material misstatement, whether caused by fraud or error. This includes an assessment of: whether the accounting policies are appropriate to the company's circumstances and have been consistently applied and adequately disclosed; the reasonableness of significant accounting estimates made by the directors; and the overall presentation of the financial statements.

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<sup>1</sup> Section 281 Companies Act – Details of adequate accounting records and directors reports are set out in Information Book 2 – Directors at section 2.6.2.

<sup>2</sup> Section 290 Companies Act.

<sup>3</sup> Section 333 Companies Act.

<sup>4</sup> Section 360 Companies Act.

<sup>5</sup> Section 289 Companies Act.



By reporting their opinion, the auditors of the company provide reasonable assurance to the members of the company that the financial statements give a true and fair view of the state of the company's affairs at a particular point in time (i.e. at the financial year end) and of its profit (or loss) for the period under review and that they have been prepared in accordance with the Companies Act and applicable accounting standards.<sup>6</sup>

In performing their audits, auditors are required to comply with International Standards on Auditing issued by the Financial Reporting Council, an independent standard setting body.

## 2.4 What Does an Audit Involve

During the course of an audit, auditors will normally perform the following types of audit work:

- furnish the company with a 'letter of engagement', in which the auditor sets out the directors' and auditors' respective responsibilities and the scope of the audit;
- obtain a knowledge of the company's business and industry;
- plan the audit, with a view to, identifying the areas of the financial statements most likely to be susceptible to the risk of error or misstatement;
- evaluate the company's system of internal control relevant to its financial statements (internal control systems are explained in summary in Appendix C to Information Book 1 – Companies);
- examine, on a test basis, the evidence relevant to the amounts and disclosures contained in the financial statements;
- assess the significant estimates and judgments made by the directors in the preparation of the financial statements;
- determine whether the accounting policies are reasonable and have been adequately disclosed;
- review the overall presentation of the financial statements;
- examine any significant events in the post balance sheet period i.e. in the period between the date to which the financial statements are made up and the date the audit is completed;
- on completion of the audit, provide the directors with a letter setting out any significant issues encountered (e.g. errors, weaknesses in internal controls etc.) during the course of the audit and making recommendations to address the problems encountered (this letter may be referred to as a 'management letter');
- issue the auditors' report to the members of the company (see below).

## 2.5 When is an Audit Required

In general, every company must have its financial statements audited annually<sup>7</sup>. However, certain companies can be exempted from the requirement to have an annual audit provided that they comply with certain conditions<sup>8</sup>. It should be noted that a company which is entitled to and chooses to avail itself of audit exemption is still obliged to keep or cause to be kept adequate accounting records, prepare annual financial statements, lay the financial statements before members and file as appropriate with the Companies Registration Office (CRO).

<sup>6</sup> ISA (UK & Ireland) 700 paragraph 16(c).

<sup>7</sup> Section 333 Companies Act.

<sup>8</sup> The criteria for audit exemption is dealt with in detail in Information Book 1 – Companies at section 2.10.3.



## 2.6 Qualifications of an Auditor

In order to qualify to act as auditor to a company, a person must comply with a number of requirements. They must:

- be a member of a body of accountants<sup>9</sup> deemed to have been granted recognition under Section 930 of the Companies Act by IAASA for the purposes of the 2010 Audit Regulations and Section 1435 of the Companies Act; and
- hold a qualification from that recognised body to undertake an audit.

Auditors who are qualified to act in other EU member states may carry out audits in the State if they pass an aptitude test. This right may also be extended to auditors who are qualified to act in non-EU member states if they obtain approval by IAASA.

### Non-Eligible parties

Certain parties, such as those who have links with the company being audited (for example, officers and employees of the company and their near relations) and undischarged bankrupts are prohibited from acting as auditor to a company.

Similarly, persons who are the subject of a disqualification order are precluded from acting as company auditors. The Companies Act also requires certain standards of continuing education<sup>10</sup>, professional ethics<sup>11</sup>, integrity and objectivity<sup>12</sup> of auditors.

### Professional requirements

In addition to the legal prohibitions on certain persons acting as company auditors, accountants are subject to various other professional requirements relating to the circumstances under which they are permitted to act as a company's auditor. The purposes of these are to preserve the independence of the auditor.

## 2.7 Appointment of Auditors<sup>13</sup>

The first auditors of a company may be appointed by the directors at any time before the first annual general meeting (AGM) of the company. An auditor so appointed will hold office until the conclusion of that first AGM. After that, the auditors are appointed by the members of the company in annual general meeting and hold office until the next such meeting.

## 2.8 Remuneration of Auditors<sup>14</sup>

In the case of auditors appointed by the directors, the auditors' remuneration may be fixed by the directors. In most other cases, the auditors' remuneration is fixed by the company at the AGM.

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<sup>9</sup> Each of the following bodies of accountants have been granted recognition under the Companies Act.

- (a) the Association of Chartered Certified Accountants;
- (b) Chartered Accountants Ireland,
- (c) the Institute of Chartered Accountants in England and Wales;
- (d) the Institute of Chartered Accountants in Scotland;
- (e) the Institute of Certified Public Accountants in Ireland; and
- (f) the Institute of Incorporated Public Accountants.

<sup>10</sup> Regulation 39 of S.I. No. 220 of 2010.

<sup>11</sup> Regulation 40 of S.I. No. 220 of 2010.

<sup>12</sup> Regulation 41 of S.I. No. 220 of 2010.

<sup>13</sup> Section 382 Companies Act.

<sup>14</sup> Section 381 Companies Act.



## 2.9 Auditors' Duties

### 2.9.1 Duty to Provide an Audit Report

The principal duty of the auditors to a company is to report to the members of the company on the statutory financial statements laid before the members as examined by them<sup>15</sup>. The auditor's opinion seeks to enhance the credibility of the financial statements by providing reasonable assurance from an independent source that they give a true and fair view.

The auditors' report on the statutory financial statements to be laid before the company in general meeting must comply with the requirements of the Companies Act and auditing standards.

The statutory auditors' report must include:

- an introduction identifying the entity financial statements, and where appropriate the group financial statements, that are the subject of the audit and the financial reporting framework that has been applied in their preparation; and
- a description of the scope of the audit identifying the auditing standards in accordance with which the audit was conducted.

The statutory auditors' report must state clearly the auditors' opinion<sup>16</sup> as to:

- whether the statutory financial statements give a true and fair view:
  - (a) In the case of an entity balance sheet, of the assets, liabilities and financial position of the company as at the end of the financial year,
  - (b) In the case of an entity profit and loss account, of the profit or loss of the company for the financial year,
  - (c) In the case of group financial statements, of the assets, liabilities and financial position as at the end of the financial year and of the profit or loss for the financial year of the undertakings included in the consolidation as a whole, so far as concerns the members of the company;
- whether the statutory financial statements have been properly prepared in accordance with the relevant financial reporting framework and, in particular with the requirements of the Companies Act (and, where applicable, Article 4 of the IAS Regulation)<sup>17</sup>.

The auditors' report must also state<sup>18</sup>:

- whether they have obtained all the information and explanations which to the best of their knowledge and belief, are necessary for the purposes of their audit;
- whether, in their opinion, the accounting records of the company were sufficient to permit the financial statement to be readily and properly audited;
- whether, in their opinion, information and returns adequate for their audit have been received from branches of the company not visited by them;
- in the case of entity financial statements, whether the company's balance sheet and the profit and loss account are in agreement with the accounting records and returns; and
- whether, in their opinion, the information given in the directors' report for the financial year is consistent with the statutory financial statements.

<sup>15</sup> Section 391 Companies Act.

<sup>16</sup> Section 336(3) Companies Act.

<sup>17</sup> "IAS Regulation" means Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 and Article 4 relates to a private company limited by shares.

<sup>18</sup> Section 336(4) Companies Act.



Where the auditors cannot report positively on any of the above matters, they may find it necessary to 'qualify' their audit report giving reasons for the qualification. A qualified audit report can take three forms, namely:

- a 'qualified opinion', in which the auditors state that the financial statements give a true and fair view, except for certain matters which the auditor will specify in the report;
- a 'disclaimer of opinion', in which the auditors state that they are unable to form an opinion as to whether the financial statements give a true and fair view. A disclaimer of opinion will arise where the scope of the auditors' work has been limited in some way e.g. they have been unable to gain access to all of the books and records; or
- an 'adverse opinion', in which the auditors state that the financial statements do not give a true and fair view. An adverse opinion will be given where the auditors are in disagreement with the financial statements and the directors are not prepared to amend them to reflect what the auditor considers to be a true and fair view.

The directors are legally required to disclose certain information in the financial statements, for example details of directors' remuneration as well as information relating to transactions the directors have entered into with the company<sup>19</sup>. Where the financial statements do not provide this information, the auditors are required to provide it in their report.

### **2.9.2 Duty to Report Failure to Keep Adequate Accounting Records<sup>20</sup>**

If, at any time, the statutory auditors form the opinion that the company being audited is contravening, or has contravened, any of sections 281 to 285 (accounting records), they are obliged to serve a notice on the company informing it of that opinion. If the necessary steps are not taken by the directors within seven days to remedy the infringement, the auditors are required to notify this to the Registrar of Companies, who in turn will notify the Director of Corporate Enforcement. It should be noted that the reporting obligation for auditors in relation to accounting records covers issues such as: failure to keep adequate accounting records, failure to notify where accounting records are kept, failure to allow access to accounting records and failure to retain accounting records for a period of six years.

The auditors are also under an obligation to make a report on this matter to the Office of the Director of Corporate Enforcement. Where the Director of Corporate Enforcement subsequently requests the auditors to do so, they are then required to furnish the Director with such information, including an explanation of the reasons for their opinion and give the Director access to documents, including facilities for inspecting and copying them.

### **2.9.3 Duty to Report Category 1 and Category 2 Offences<sup>21</sup>**

Where in the course of, and by virtue of, their carrying out an audit of the financial statements of a company, information comes into the possession of the statutory auditors that leads them to form the opinion that there are reasonable grounds for believing that the company or an officer or agent of it has committed a category 1 or 2 offence, the statutory auditors must notify that opinion to the Director of Corporate Enforcement and provide the Director with particulars of the grounds on which they have formed that opinion.

<sup>19</sup> Section 305 companies act.

<sup>20</sup> Section 392 Companies Act.

<sup>21</sup> Section 393 Companies Act.



In addition to performing their obligation of notifying the Director of their opinion, the statutory auditor, if requested by the Director, will:

- (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 of the grounds on which they formed the opinion,
- (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.

The Director, in conjunction with the Auditing Practices Board (APB) and the Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) published detailed guidance to auditors on their responsibilities under this section<sup>22</sup>.

#### **2.9.4 Duty to Exercise Professional Integrity<sup>23</sup>**

The person or firm who are appointed as statutory auditor of a company will be under a general duty to carry out the audit services concerned with professional integrity<sup>24</sup>. In preparing their report, auditors must exercise the skill, care and caution of a reasonably competent, careful and cautious auditor. Where auditors do not comply with their duty to exercise reasonable skill and care, they may be liable for damages:

- to the company under their contract; and/or
- to those parties to whom they owe a duty of care for negligence, including the company, the members and, in certain limited circumstances, prospective shareholders.

Auditors cannot exclude their liability to the company, nor can auditors have a company indemnify (insure) them against any liability to third parties in respect of negligence.<sup>25</sup>

#### **2.9.5 Duty to Furnish Evidence of Approval<sup>26</sup>**

An auditor, or a person purporting to act as an auditor, is required to provide to the Director of Corporate Enforcement on request evidence of his or her approval under the law to so act.

## **2.10 Auditors' Rights**

Auditors of companies have the following rights:

### **2.10.1 Right of Access<sup>27</sup>**

Statutory auditors of a company have a right of access at all reasonable times to the accounting records of the company.

The statutory auditors of a company or a holding company may require from the officers such information and explanations as appear to the auditors to be within the officers' knowledge or can be procured by them and which the auditors think necessary for the performance of their duties.

<sup>22</sup> The guidance, which is contained in Decision Notice D/2006/2 'Revised Guidance on the Duty of Auditors to Report Suspected Indictable Offences to the Director of Corporate Enforcement', is available on the ODCE website (address: [www.odce.ie](http://www.odce.ie)). As the guidance was issued jointly with the Auditing Practices Board (APB), the guidance has also been published in the form of an APB Audit Bulletin.

<sup>23</sup> Section 390 Companies Act.

<sup>24</sup> S.I. No. 220 of 2010.

<sup>25</sup> Regulation 51 S.I. No. 220 of 2010.

<sup>26</sup> Regulation 28 S.I. No. 220 of 2010.

<sup>27</sup> Section 386 Companies Act.



An officer who fails to comply with a request within two days after the request, to provide information or explanations that are within the knowledge of, or can be procured by, the officer will be guilty of a category 2 offence<sup>28</sup>. An officer for the purposes of this section includes any employee of the company and any shadow director and *de facto* director of it.

Subsidiary companies incorporated in the State and their officers are also required to give the auditor of the holding company such information and explanations as that auditor may reasonably require for the performance of their duties. Where the company has subsidiaries outside the State, the company itself is obliged to take all reasonable steps to obtain such information and explanations for the auditors.

An officer of a company who knowingly makes a statement either orally or in writing to the statutory auditor that is misleading or false in a material particular, or makes such a statement being reckless as to whether it is so, shall be guilty of a category 2 offence<sup>29</sup>. An officer for the purposes of this section includes any employee of the company and any shadow director and *de facto* director of it.

### **2.10.2 Right of Notification and Attendance at Company General Meeting<sup>30</sup>**

Auditors are entitled to attend any general meeting of the company and to receive the same notices and communications relating to meetings as the members, unless the company is entitled to and has availed of audit exemption. They also have the right to be heard at all general meetings on any part of the meeting that concerns them as statutory auditor.

## **2.11 Removal of Auditors**

### **2.11.1 Removal of Statutory Auditor where Audit Exemption is being Availed of by Company<sup>31</sup>**

A company which is entitled to and avails itself of audit exemption and decides not to re-appoint the statutory auditor, or decides to terminate the appointment of the statutory auditor, must notify the auditor of that decision. The statutory auditor will within 21 days of the date of the company's notified decision, serve a notice on the company containing a statement to the effect that either:

- (a) there are no circumstances connected with the decision of the company that the statutory auditors concerned considers should be brought to the notice of the members or creditors of the company, or
- (b) there are circumstances that the statutory auditor considers should be brought to the attention of members or creditors.

Unless and until the statutory auditors serve such a notice any purported termination of their appointment as statutory auditor to the company shall not have effect.

Where the auditor serves a notice on the company containing a statement, the statutory auditor concerned must within 14 days after the date of such service, send a copy of the notice to the Registrar of Companies<sup>32</sup>. If the statement from the statutory auditors contains circumstances which should be brought to the attention of members or creditors, the company must within 14 days of the date of service send a copy of the notice to every person who is entitled to receive the notice.

<sup>28</sup> Section 387 Companies Act.

<sup>29</sup> Section 389 Companies Act.

<sup>30</sup> Section 180(6) Companies Act.

<sup>31</sup> Section 399 Companies Act.

<sup>32</sup> Section 399(3)(a) Companies Act.



### 2.11.2 Resignation of the Statutory Auditor<sup>33</sup>

A statutory auditor may serve notice in writing on the company stating their intention to resign. The notice must contain a statement to the effect that either:

- (a) there are no circumstances connected with the resignation that should be brought to the notice of the members or creditors of the company, or
- (b) there are circumstances that the statutory auditor considers should be brought to the attention of members or creditors.

Where the statutory auditor serves a notice on the company of their resignation, they must within 14 days send a copy of the notice to the Registrar of Companies. Where the auditor has listed circumstances in the notice that should be brought to the attention of members, the company must within 14 days send a copy of the notice to every person who is entitled to receive a copy.

### 2.11.3 Removal of Statutory Auditors in General Meetings<sup>34</sup>

A company may, by ordinary resolution at a general meeting, remove a statutory auditor and appoint, in his or her place, any other person or persons who have been nominated for appointment by any member of the company and who holds the relevant qualifications as set out in European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220 of 2010), to become statutory auditor of the company, and whose nomination notice has been given to the members.

The passing of a resolution for the removal of the statutory auditor will not be effective unless there are good and substantial grounds for the removal related to the conduct of the auditors in performing his or her duties as auditor of the company, or the passing of the resolution is, in the company's opinion, in the best interests of the company. However, diverging opinions on accounting treatment or audit procedures cannot constitute the basis for the passing of any such resolution and reference to the "best interests of the company" does not include any illegal or improper motive, such as, avoiding disclosures or detection of any failure by the company to comply with its obligations under the Companies Act.<sup>35</sup>

### 2.11.4 Extended Notice Required to Appoint and or Remove Auditor<sup>36</sup>

Extended notice of 28 days is required for a resolution at a general meeting to remove the serving statutory auditor and/or appoint a new statutory auditor.

The statutory auditor who is the subject of the resolution to remove him/her is entitled to make representations in writing to the company and request their notification be sent to members of the company. In addition, the statutory auditor removed from office has a right to receive notice and attend the next AGM of the company after their removal and the general meeting that is proposing their replacement<sup>37</sup>.

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<sup>33</sup> Section 400 Companies Act.

<sup>34</sup> Section 394 Companies Act.

<sup>35</sup> Section 395 Companies Act.

<sup>36</sup> Section 396 Companies Act.

<sup>37</sup> Section 398 Companies Act.



### **2.11.5 Duty to Notify IAASA of Auditor's Cessation from Office Between Company AGM's<sup>38</sup>**

Where a statutory auditor ceases to hold office by way of resignation or unwillingness to be re-appointed or is removed from office between AGM's, the auditor has a duty to notify IAASA within 30 days that they have ceased to hold office.

Likewise, the company has a duty to notify IAASA within 30 days of the statutory auditor ceasing to hold office between AGM's by way of resignation or unwillingness to be re-appointed or is removed from office as statutory auditor.

### **2.11.6 Prohibition on Acting as Statutory Auditor while Disqualified<sup>39</sup>**

A person who is the subject of a disqualification order is prohibited from becoming or remaining a partner in a firm of statutory auditors as of 28 days from the date of the disqualification order.

They are also prohibited from giving instructions or directions in relation to an audit of financial statements of a company or work in any capacity in the conduct of an audit of financial statements of a company. A person who breaches this prohibition will be guilty of a category 2 offence and their disqualification order can be extended for a further period of up to 10 years.

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<sup>38</sup> Sections 403 & 404 Companies Act.

<sup>39</sup> Section 405 Companies Act.



## 3.0 Penalties Under the Companies Act

### 3.1 Penalties for Criminal Offences

#### Court Imposed Penalties

Under the Companies Act, 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.

Under Section 871 of the Companies Act, a person guilty of an offence under the Companies Act that is stated to be a category 1 offence shall be liable:

- on summary conviction, to a class A<sup>40</sup> fine or imprisonment for a term not exceeding 12 months or both; or
- on conviction on indictment to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years or both.

In general, a person guilty of an offence under the Companies Act that is stated to be a category 2 offence shall be liable:

- on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both; or
- on conviction on indictment to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

A person guilty of an offence under the Companies Act that is stated to be a category 3 offence will be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 6 months or both.

A person guilty of an offence under the Companies Act that is stated to be a category 4 offence will be liable on summary conviction to a class A fine.

The Court in which a conviction for an offence under the Companies Act is affirmed or recorded may order the person convicted to remedy the breach<sup>41</sup>.

However, the Companies Act also provides for considerably higher sanctions in relation to certain offences, such as:

- Transparency Directive<sup>42</sup> – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under transparency (regulated markets) law<sup>43</sup>;

<sup>40</sup> “Class A fine” at the date of publication means a fine not exceeding €5,000 (Source: Fines Act 2010).

<sup>41</sup> Section 872 Companies Act.

<sup>42</sup> Transparency (Directive 2004/109/EC) Regulations 2007 – S.I. No. 277 of 2007.

<sup>43</sup> Section 1382 Companies Act.

- Prospectus Directive<sup>44</sup> – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under Irish Prospectus Law<sup>45</sup>;
- Market Abuse Directive<sup>46</sup> – a fine of up to €10 million and/or 10 years imprisonment on conviction on indictment under Irish market abuse law<sup>47</sup>.

### 3.2 Civil Penalties

#### Disqualification

In addition to fines and penalties for criminal offences, there are also provisions for other sanctions under the Companies Act, such as disqualification and restriction.

Disqualification means a person being disqualified from being appointed or acting as a director or other officer, statutory auditor, receiver, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of any company<sup>48</sup>.

A person can be disqualified by way of:

- (a) Disqualification Order by the court; or
- (b) Accepting a Disqualification Undertaking – whereby the person submits to being subject to disqualification, by accepting and signing a prescribed disqualification undertaking.

#### Automatic Disqualification<sup>49</sup>

A person is automatically disqualified by the court, if that person is convicted on indictment of:

- any offence under the Companies Act or any other enactment in relation to a company as prescribed; or
- any offence involving fraud or dishonesty.

A person disqualified by the court is subject to a disqualification order for a period of 5 years or other period as specified by the court. The court is obliged to send details of the disqualification order to the Registrar of Companies so that the details supplied are included in the public register of disqualified persons<sup>50</sup>.

The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person on a number of grounds<sup>51</sup> including:

- guilty of two or more offences in relation to accounting records offences (section 286);
- guilty of persistent defaults under the Companies Act;
- guilty of fraudulent or reckless trading while an officer of a company.

<sup>44</sup> Prospectus (Directive 2003/71/EC) Regulations 2005 – S.I. No. 324 of 2005.

<sup>45</sup> Section 1356 Companies Act.

<sup>46</sup> Market Abuse (Directive 2003/6/EC) Regulations 2005 – S.I. No. 342 of 2005.

<sup>47</sup> Section 1368 Companies Act.

<sup>48</sup> Section 838 Companies Act.

<sup>49</sup> Section 839 Companies Act.

<sup>50</sup> Sections 863 & 864 Companies Act.

<sup>51</sup> Section 842 Companies Act.





### **Disqualification Undertaking<sup>52</sup>**

This is a new administrative procedure that provides a person (where the Director is of the opinion that certain circumstances in relation to a person apply) with an option to submit to a disqualification without the need for a court hearing. This procedure can be availed of where the Director has reasonable grounds for believing that one or more of the circumstances specified in section 842(a) to (i) of the Companies Act applies to the person<sup>53</sup>. The Director of Corporate Enforcement may, at his discretion, offer the person an opportunity to submit to a disqualification. Where the person submits to a “disqualification undertaking” and returns the disqualification acceptance document duly signed to the Director, they are deemed to be a disqualified person. The Director is obliged to send details of the disqualification to the Registrar of Companies, for inclusion in the public register of disqualified persons<sup>54</sup>.

### **Restriction**

The provisions relating to the restriction of company directors<sup>55</sup> apply to insolvent companies, i.e. companies that are unable to pay their debts<sup>56</sup> as they fall due. Where a company which goes into liquidation or receivership and is insolvent, a director of the company who fails to satisfy the Director of Corporate Enforcement or the Court that he or she has acted honestly and responsibly may be restricted for a period of up to five years.

### **Restriction Undertaking<sup>57</sup>**

This is a new administrative procedure that provides the person with an opportunity to submit to a restriction without the need for a court hearing. The Director may, at his discretion, offer the director of an insolvent company an opportunity to submit to be restricted. The offer will include the circumstances, facts and allegations leading to the Director forming the belief that restriction is appropriate.

Where the person accepts the restriction, and returns the restriction acceptance document, duly signed, the Director will send details of the “restriction undertaking” to the Registrar of Companies, for inclusion in the register of restricted persons<sup>58</sup>.

Such a restriction prevents a person from being appointed or acting in any way, directly or indirectly as a director or secretary or being involved in the formation or promotion of any company unless it is adequately capitalised<sup>59</sup>. In the case of a public limited company (other than an investment company), the capital requirement is €500,000 in allotted paid up share capital, and in the case of any other company, the capital requirement is €100,000. Such a company is also subject to stricter rules in relation to capital maintenance.

A person who continues in office as a director of a company on the restriction taking place without the company being adequately capitalised, will be deemed, without proof of anything more to have contravened the Companies Act and will be automatically disqualified as a director. The topic of restriction is dealt with in detail in Appendix B to Information Book 2.

<sup>52</sup> Section 849 Companies Act.

<sup>53</sup> These are the circumstances which if the court were satisfied that they applied would result in a disqualification order, and are set out in section 862 Companies Act.

<sup>54</sup> Section 864 Companies Act.

<sup>55</sup> Section 819 & 820 Companies Act.

<sup>56</sup> Section 570 Companies Act.

<sup>57</sup> Section 852 Companies Act.

<sup>58</sup> Section 823 Companies Act.

<sup>59</sup> Section 819(3) Companies Act.



A person who acts in relation to any company in a manner or a capacity which they are prohibited by virtue of being (a) subject to a disqualification order, or (b) subject to a declaration of restriction, shall be guilty of a category 2 offence<sup>60</sup>.

#### **Strike Off<sup>61</sup>**

The Registrar of Companies may give notice of the intention to strike a company off the register on any of the following grounds:

- the company has failed to make an annual return as required; or
- there are no persons recorded as being current directors of the company; or
- the Revenue Commissioners have given notice of the company's failure to deliver a statement of particulars by new companies; or
- the Registrar has reasonable cause to believe that the company is not complying with the requirement to have a director resident in an EEA state or does not hold the requisite bond in the absence of such a director<sup>62</sup>; or
- the company is being wound up and the Registrar has reasonable cause to believe that no liquidator is acting; or
- the company is being wound up and no returns have been made by the liquidator for a period of 6 consecutive months.

If a company is struck off the register, ownership of a company's assets automatically transfers to the State. Ownership will remain with the State until such time as the company is restored to the register. While struck off, the liability of every director, officer and member of the company continues and may be enforced<sup>63</sup> as though the company had not been dissolved.

The procedures required to have a company reinstated to the register are dealt with in Appendix A to Information Book 1 – Companies. Specific and detailed information on restoring a company to the Register is available on the CRO website – [www.cro.ie](http://www.cro.ie)

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<sup>60</sup> Section 855 Companies Act.

<sup>61</sup> Section 725 Companies Act.

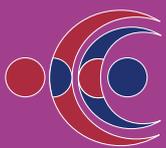
<sup>62</sup> Section 137 Companies Act.

<sup>63</sup> Section 734 Companies Act.









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*Tá leagan Gaeilge den leabhrán seo ar fáil  
An Irish version of this booklet is available*